

No. 12668

2659

United States
Court of Appeals
for the Ninth Circuit.

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation, and E. J. ODERMATT,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 314)

FILED

JAN 1951

PAUL P. O'BRIEN
CLERK

Appeal from the United States District Court,
for the District of Nevada.

No. 12668

United States
Court of Appeals
for the Ninth Circuit.

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation, and E. J. ODERMATT,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 314)

Appeal from the United States District Court,
for the District of Nevada.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	3
Answer to Amended Complaint.....	14
Answer of Defendant, Standard Oil Co. of California, a Corporation, to the Amended Complaint	9
Certificate	8
Explanation Requested by Jury of Instruction No. 22	23
Instructions to the Jury.....	25
Jury's Request for Explanation of Instruction No. 22	23
Motion for New Trial.....	47
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	50
Notice of Court's Decision on Motion for New Trial	49
Order on Pre-Trial Conference.....	17
Proceedings in Chambers.....	536
Statement of Points and Designation of Portions of Record to Be Printed.....	539

	INDEX	PAGE
Transcript of Testimony.....		51
Verdict		47
Witnesses, Defendants':		
Harmer, Francis		
—direct		454, 457
—cross		463
—redirect		469
Nielson, Lee James		
—direct		400, 431, 488
—cross		432, 490
—redirect		443
Odermatt, E. J.		
—direct		52, 387, 470, 496
—cross		63
—redirect		75, 85
—recross		84
Ryan, Jacob A.		
—direct		498
—cross		513, 519
—redirect		522
—recross		523

INDEX

PAGE

Witnesses, Defendants'—(Continued) :

Warner, William

—direct 480, 483

Witnesses, Plaintiff's:

Black, William Ramsey

—direct 229

—cross 236, 243, 244

Herzinger, Edward

—direct 259, 279, 486, 315, 524, 532

—cross 323, 332, 365, 369, 525

—redirect 378, 534

—recross 384

Klitz, William A.

—direct 190

—cross 205, 225

—redirect 227

Knapp, Dalton

—direct 185

—cross 188

—redirect 190

McLean, Mrs. Loretta

—direct 246

—cross 253

INDEX

PAGE

Witnesses, Plaintiff's—(Continued):

Moseley, Ross Fred

—direct	86, 91, 465, 491, 493, 494
—cross	114, 118, 149, 168, 169, 468
—redirect	169, 468
—recross	177

Richards, Mrs. Katherine

—direct	256
—cross	258

NAMES AND ADDRESSES OF ATTORNEYS

ORVILLE R. WILSON, ESQ.,
First National Bank Building,
Elko, Nevada,

MESSRS. PARRY, KEENAN, ROBERTSON
& DALY,
Fidelity Bank Building,
Twin Falls, Idaho,
For the Appellant.

MESSRS. GRISWOLD and VARGAS,
206 North Virginia Street,
Reno, Nevada,

A. L. PUCCINELLI, ESQ.,
Elko, Nevada,

JOHN S. HALLEY, ESQ.,
P. O. Box 1684,
Reno, Nevada, for O. J. Odermatt,

SAMUEL PLATT, ESQ.,
First National Bank Building,
Reno, Nevada, for Standard Oil Company
of Calif.,
For the Appellees.

In the District Court of the United States
For the District of Nevada
Civil Action File No. 680

EDWARD HERZINGER,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFOR-
NIA, a Corporation, and O. J. ODERMATT,
Defendants.

AMENDED COMPLAINT

For cause of action against above named de-
fendants, plaintiff alleges:

I.

That plaintiff is a citizen of the State of Idaho; that defendant Standard Oil Company of California is a corporation incorporated under the laws of the State of Delaware; that the defendant O. J. Odermatt is a citizen of the State of Nevada.

II.

That the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars.

III.

That on and prior to May 3, 1947, the defendant, O. J. Odermatt, acting for and on behalf of defendant Standard Oil Company of California and as its agent or employee, or both, sold, distributed, transported and delivered at Wells, Nevada, and

tributary points the petroleum products produced, refined and marketed by said defendant Standard Oil Company of California and that the said defendant Odermatt in connection with the performance of his said duties as such agent or employee, or both, of defendant Standard Oil Company of California, had, among other things, the power and authority to procure the services of persons to assist him in the performance of his said duties for said defendant, Standard Oil Company of California, and particularly to assist him in the sale, distribution, transportation and delivery of the petroleum products marketed by defendant Standard Oil Company of California.

IV.

That Contact, Nevada, and vicinity is a point tributary to Wells, Nevada; that on and prior to May 3, 1947, plaintiff was the owner and in the possession of those premises in the vicinity of Contact, Nevada, commonly called "Hot Springs," and more particularly described as follows:

Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ SW $\frac{1}{4}$) of Section Nine (9) and Northwest Quarter of the Northwest Quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section Sixteen (16), Township Forty-five (45) North, Range Sixty-four (64) East, M.D.B. & M.,

on which the buildings in which plaintiff was operating a bathhouse, and other buildings separate from the bath house, grouped together along U. S. Highway No. 93, in which plaintiff was on and

prior to May 3, 1947, also operating a retail grocery, wine and liquor store and bar room with accessories, and tourist cabins and also an automobile service station, wherein and whereby plaintiff sold at retail petroleum products sold to him at wholesale by defendant Standard Oil Company of California; these latter buildings are hereinafter called the highway buildings.

V.

That shortly after noon of May 3, 1947, the defendant O. J. Odermatt in the course of the performance of his duties as agent or employee or both for defendant Standard Oil Company of California, in the sale, distribution, transportation and delivery of defendant Standard Oil Company of California's petroleum products was engaged in the sale and delivery to the plaintiff, Edward Herzinger, of petroleum products, to-wit: gasoline, of the defendant Standard Oil Company of California; that said gasoline was then and there being delivered from a truck tank into an underground storage tank on the premises above mentioned of plaintiff, which said tank was located in front of and near the highway buildings of the plaintiff; that the actual delivery of such gasoline was being done by an assistant procured by defendant O. J. Odermatt; that the said assistant in the delivery of said gasoline to the plaintiff so negligently did, managed and conducted the delivery of said gasoline into said underground storage tank that said gasoline became ignited; that from said burning gasoline

flames spread to the highway buildings and structures owned by the plaintiff; that said buildings and structures caught fire therefrom and burned so rapidly that said buildings and structures and their contents were thereby totally destroyed.

VI.

That the buildings and structures so destroyed as aforesaid were the following:

- One cabin
- One oil house
- One canopy roof
- One pump house
- One store building
- One lean-to
- One bar room

That the value thereof immediately prior to their destruction as aforesaid was as follows:

Cabin	\$ 625.79
Oil House	1188.94
Canopy roof	348.75
Pump house	438.75
Store building	1440.00
Lean-to	360.00
Bar room	5986.12

and the total value thereof as of said time was \$12,540.00.

VII.

That in said buildings at the time of their destruction aforesaid, and totally destroyed therewith,

in such fire, was personal property owned by plaintiff Edward Herzinger as follows:

Furniture, fixtures and equipment;

Currency and silver;

Stock of merchandise consisting of petroleum products, groceries, beer, wines, liquors and tobacco.

That the value of said furniture, fixtures and equipment immediately prior to their destruction aforesaid was the sum of \$11,977.45; that the value of said currency and silver immediately prior to its destruction was upwards of \$2500.00; that the value of said stock of merchandise immediately prior to its destruction aforesaid was the sum of \$16,761.36.

Wherefore, Plaintiff Prays Judgment Against Defendants for the sum of \$12,540.00, value of buildings destroyed; for the sum of \$31,238.81, value of personal property destroyed; and for his costs herein.

/s/ ORVILLE R. WILSON,

PARRY, KEENAN, DALY
and ROBERTSON,

By /s/ ORVILLE R. WILSON,
Attorneys for Plaintiff.

Service of a copy of Amended Complaint in the above-entitled action is hereby admitted and acknowledged this 13th day of July, 1948.

GRISWOLD & VARGAS,

JOHN S. HALLEY,

A. L. PUCCINELLI,

Attorneys for O. J. Odermatt.

By /s/ A. L. PUCCINELLI.

[Title of District Court and Cause.]

CERTIFICATE

The undersigned does hereby certify that he is one of the attorneys of record for plaintiff, Edward Herzinger. That on the 13th day of July, 1948, he served upon defendant Standard Oil Company of California, a corporation, a copy of Amended Complaint by mailing said copy to Samuel Platt, Esq., Attorney at Law, First National Bank Building, Reno, Nevada, Attorney for said defendant, Standard Oil Company of California. Said copy of Amended Complaint was enclosed in an envelope addressed to said Samuel Platt at the above-designated address, which said envelope was deposited in the United States Post Office, Elko, Nevada, for mailing all on said date.

/s/ ORVILLE R. WILSON,

One of the Attorneys
for Plaintiff.

[Endorsed]: Filed July 15, 1948.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, STANDARD OIL
COMPANY OF CALIFORNIA, A CORPO-
RATION, TO THE AMENDED COM-
PLAINT

Now Comes Standard Oil Company of California, a corporation, through its attorney, Samuel Platt, and answering the Amended Complaint on file herein, admits, denies, and alleges:

I.

This defendant admits the allegations of Paragraphs I and II.

II.

This defendant denies that on, or prior, to May 3, 1947, or at any other time, defendant, O. J. Odermatt, acting for and on behalf, or either or any, of defendant, Standard Oil Company of California, and as its agent or employee, or both, or any or either, sold, distributed, transported and delivered at Wells, Nevada, and tributary points the petroleum products, or any other products produced, refined and marketed, or any or either, by said defendant, Standard Oil Company of California; denies that defendant, Odermatt, at any time mentioned in said Complaint or at all, was an agent or employee, or any or either, of this defendant; denies that defendant, Odermatt, in connection with the performance of duties as agent or employee, or as agent and employee, of this defendant, had power or authority derived from this defendant to procure the services of any person

or persons to assist him in the performance of any duties for this defendant; and denies, specifically and generally, all allegations of said paragraph not hereinabove expressly and specifically denied.

III.

This defendant admits that Contact, Nevada, and vicinity, is a point tributary to Wells, Nevada; as to whether on and prior to May 3, 1947, or at any other time, plaintiff was the owner and in the possession of those premises in the vicinity of Contact, Nevada, commonly called "Hot Springs," as particularly described in said Amended Complaint, this defendant has not sufficient knowledge whereby to express a belief, and on information and belief denies the same. As to whether plaintiff was, on or prior to May 3, 1947, or at any other time, in possession of buildings alleged to have been upon said premises or was operating a bath-house or other buildings separate from the bath-house, or as to whether said buildings were grouped together along U. S. Highway 93, or whether plaintiff was, on or prior to May 3, 1947, or at any other time, operating a retail grocery, wine and liquor store, and bar-room with accessories, or any or either, or tourist cabins or an automobile service station, or any or either, this defendant has not sufficient information whereby to express a belief, and on information and belief denies the same.

This defendant admits that plaintiff sold, at retail, petroleum products sold to him at wholesale by

this defendant, Standard Oil Company of California.

IV.

This defendant denies that the defendant, O. J. Odermatt, performed any duties as agent or employee, or as agent and employee, of this defendant on the afternoon of May 3, 1947, as alleged in the Amended Complaint, or at any other time, or otherwise. As to whether the defendant, O. J. Odermatt, but not as an agent or employee, or both, for this defendant did, on the 3rd day of May, 1947, sell and deliver to the plaintiff this defendant's petroleum products or gasoline, or any or either, this defendant has not sufficient knowledge whereby to express a belief, and on information and belief denies the same. As to whether said gasoline was then and there, or at all, being delivered from a truck tank into an underground storage tank on any part or portion of plaintiff's premises, or at all, or whether said tank was located in front of, or near, the highway buildings of the plaintiff described in said Complaint, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief denies the same. As to whether the actual delivery of any gasoline, as alleged in said Complaint, was being done by an assistant procured by defendant, O. J. Odermatt, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief, denies the same. This defendant is informed and believes, and upon information and belief denies, that said, or any, assistant of the defendant, O. J.

Odermatt, or any other persons, negligently did manage or conduct or any or either, the delivery of said or any gasoline into said underground storage tank, or any other tank, so that said, or any, gasoline became ignited. This defendant admits on information and belief that on, or about, the 3rd day of May, 1947, that property alleged to be owned and possessed by the plaintiff was destroyed by fire, but as to whether plaintiff was the owner of said buildings or any thereof, or any of the contents thereof, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief, denies the same.

V.

As to the allegations of Paragraph VI. of said Amended Complaint, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief, denies, generally and specifically, each and every allegation in said paragraph.

VI.

As to the allegations of Paragraph VII of plaintiff's Amended Complaint, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief, denies, generally and specifically, each and every allegation in said paragraph.

VII.

As to the allegations of Paragraph VIII of plaintiff's Amended Complaint, this defendant has not sufficient knowledge whereby to express a belief,

and upon information and belief, denies, generally and specifically, each and every allegation in said paragraph.

Wherefore, this defendant, Standard Oil Company of California, a corporation, prays that it be hence dismissed with costs.

/s/ SAMUEL PLATT,
Attorney for Defendant, Standard Oil Company of
California, a Corporation.

State of Nevada,
County of Washoe—ss.

Arthur Hodge, being first duly sworn, upon oath, deposes and says:

That he has been for some time last past, and is now, the Branch District Manager of the defendant, Standard Oil Company of California, a corporation, and makes this verification for and on behalf of said defendant, Standard Oil Company of California, that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

/s/ ARTHUR HODGE.

Subscribed and Sworn to before me this 4th day of August, 1948.

[Seal] /s/ CECILIA PRIEST,
Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: Filed August 5, 1948.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant O. J. Odermatt, and for himself alone, and for no other defendant, answering the Amended Complaint of plaintiff on file herein, admits, denies and alleges as follows:

I.

Answering Paragraphs I and II of said Amended Complaint, said defendant admits all matters in said paragraphs contained.

II.

Answering Paragraph IV of said Amended Complaint, said defendant states that as to the averments therein contained in approximately Line 12, Page 2, and commencing with the words "in the possession of," and ending with approximately Line 24, Page 2, with the words "and tourist cabins and," said defendant is without knowledge or information sufficient to form a belief as to the truth of said averments, and each and every part thereof.

III.

Answering Paragraph V of said Amended Complaint, said defendant admits that shortly after noon of May 3, 1947, the defendant O. J. Odermatt was engaged in the sale and delivery to the plaintiff, Edward Herzinger, of petroleum products, to-wit, gasoline, of the defendant Standard Oil Company of California, and admits that said gasoline was then and there being delivered from a truck tank into

an underground storage tank on the premises described in said Amended Complaint, which said tank was located in front of and near the highway buildings described and alleged in said Amended Complaint; and admits that the actual delivery of such gasoline was being done by an assistant procured by defendant O. J. Odermatt. Further answering Paragraph V of said Amended Complaint, said defendant denies that said assistant in the delivery of said gasoline, or otherwise, or at all, to the plaintiff, or to any person whomsoever, or at all, did negligently or so negligently, or negligently at all, manage or conduct the delivery of said gasoline into said underground storage tank as to cause in any wise, or at all, said gasoline to become or be ignited. Further answering said Paragraph V of said Amended Complaint, and in particular, answering the averments therein contained reading as follows: "that from said burning gasoline flames spread to the highway buildings and structures owned by the plaintiff; that said buildings and structures caught fire therefrom and burned so rapidly that said buildings and structures and their contents were thereby totally destroyed," said defendant denies all of said averments, and each and every part thereof, said defendant denying each, every and all of the averments and each and every portion thereof, commencing with the words "that the said assistant in the delivery of said gasoline," and concluding with the words "thereby totally destroyed."

IV.

Answering Paragraph VI of said Amended Complaint, said defendant denies all matters and averments in said paragraph contained and each and every part thereof, and as to the items and values thereof set forth and alleged in said Paragraph VI of said Amended Complaint, said defendant denies that any item alleged in said paragraph is of the value therein alleged, or of any value whatsoever, or at all, and denies that the total value thereof, as of said time, or of any time, was the sum of Ten Thousand Three Hundred Eighty-eight and $35/100$ Dollars (\$10,388.35), or any sum whatsoever, or at all.

V.

Answering Paragraph VII of said Amended Complaint, said defendant denies all matters in said paragraph contained, and each and every averment thereof, and further denies that the value of the furniture or fixtures or equipment was the sum of Eleven Thousand Nine Hundred Seventy-seven and $45/100$ Dollars (\$11,977.45), or any other sum whatsoever, or at all; and denies that the value of currency and silver was upwards of, or of, the sum of Twenty-five Hundred Dollars (\$2500.00), or any sum whatsoever, or at all; and denies that the value of stock of merchandise therein alleged was the sum of Sixteen Thousand Seven Hundred Sixty-one and $36/100$ Dollars (\$16,761.36), or any sum whatsoever, or at all.

VI.

Answering Paragraph VIII of said Amended

Complaint, said defendant states that as to each, every and all of the averments in said Paragraph VIII contained, he is without knowledge or information sufficient to form a belief as to the truth of any or all averments therein, and upon this ground denies all averments in said Paragraph VIII contained, and each and every part thereof.

Wherefore, said defendant prays that plaintiff take nothing by virtue of his Amended Complaint on file herein; and that said defendant be given and granted judgment against the plaintiff for his costs and disbursements herein incurred and for such other and further relief as to the Court may appear just and proper in the premises.

/s/ MORLEY GRISWOLD,

/s/ GEORGE L. VARGAS,

/s/ JOHN S. HALLEY,

Attorneys for

Said Defendant.

[Endorsed]: Filed October 16, 1948.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

Pursuant to the Order heretofore made, the Pre-Trial Conference in the above-entitled action was held at Reno, Nevada, at 10:00 a.m. of September 9th, 1949, Messrs. R. P. Parry, John H. Daly and Orville R. Wilson appearing for plaintiff; Messrs.

John S. Halley, A. L. Puccinelli and George L. Vargas appearing for defendant E. J. Odermatt; and Samuel Platt, Esq., appearing for defendant Standard Oil Company of California,

It Is Hereby Ordered that the action taken at such Pre-Trial Conference is as follows:

Paragraphs I and II of the Amended Complaint are admitted.

As to Paragraph III of the Amended Complaint:

Standard Oil Company of California denies that on May 3, 1947, or at any other time involved in this action, defendant E. J. Odermatt was an employee or agent of the Standard Oil Company of California, or at any of the times mentioned in the Amended Complaint acted as an employee or agent.

Defendant Standard Oil Company's position is that the defendant E. J. Odermatt was acting as an independent contractor in regard to all matters alleged in the Complaint.

Defendant E. J. Odermatt takes the position that at all the times mentioned in the Complaint he was acting as agent or employee of the defendant Standard Oil Company.

The allegations contained between Lines 1 and 3 of p. 3 of the Answer of defendant Standard Oil Company are considered as amended to read as follows: This defendant admits that plaintiff sold at retail petroleum products produced by the defendant Standard Oil Company of California but denies that such petroleum products were sold to plaintiff at wholesale directly.

The defendant Standard Oil Company of California contends that the products of the Standard Oil Company of California with which we are concerned here were, by the Standard Oil Company of California, sold at wholesale to the defendant Odermatt.

As to the matters contained in Paragraph III of the Amended Complaint, plaintiff's contention is that Odermatt was acting as either an agent or employee of Standard Oil Company and that plaintiff purchased all of his petroleum products at wholesale from the Standard Oil Company through Mr. Odermatt, its agent or employee.

Defendant Odermatt contends that there is no sale from the Standard Oil Company to Odermatt but that the sale from Standard Oil to the plaintiff Herzinger was through Odermatt, defendant Odermatt acting as a distributor and/or agent for the Standard Oil Company, being compensated by a commission for the handling of the Standard Oil Products.

As to Paragraph IV of the Amended Complaint, defendant Odermatt admits that on May 3, 1947, the plaintiff was the owner of the property alleged in Paragraph IV of the Amended Complaint; admits that on the 3rd day of May, 1947, plaintiff was the owner of the premises therein described but for want of information denies that plaintiff was in possession of the premises, that plaintiff was operating the premises and operating those businesses which he describes in said paragraph; and defendant admits

plaintiff was then and there operating an automobile service station on said premises. Standard Oil Company desires that the question of ownership of the premises described in Paragraph IV of the Amended Complaint be left in abeyance until the Standard Oil Company has had an opportunity to further make inquiry as to the ownership of said premises but the Standard Oil Company denies all matters alleged in Paragraph IV which have been denied by the defendant Odermatt and particularly denies that said plaintiff sold on said premises at retail petroleum products sold to him at wholesale by defendant Standard Oil Company of California.

As to Paragraph V of the Amended Complaint:

Defendant E. J. Odermatt admits that shortly after noon of May 3, 1947, he was engaged in the sale and delivery to the plaintiff Edward Herzinger of gasoline of the defendant Standard Oil Company of California; defendant Odermatt admits that said gasoline was then and there delivered from a truck tank into an underground storage tank on the premises of plaintiff which said tank was located in front and near the highway buildings of plaintiff; defendant Odermatt admits that the actual delivery of said gasoline was being done by an assistant procured by E. J. Odermatt. Defendant Odermatt admits that on the said May 3, 1947, a fire occurred at the premises described in the Complaint before the delivery truck had left the said premises and while the said truck was at the physical point of the delivery upon

said premises. Defendant Odermatt denies that the said fire resulted from any negligence on the part of the assistant of said defendant Odermatt.

Standard Oil Company admits that said fire occurred at the time and place stated in the admission of the defendant Odermatt in regard to the time and place of said fire but denies that said fire was caused by any negligence on the part of said defendant Standard Oil Company or any of its agents or employees.

Defendants Odermatt and Standard Oil Company each deny that the gasoline being then and there delivered into the underground storage tank on said premises became ignited and said defendants also deny that burning gasoline flames spread into the highway buildings and structures owned by the plaintiff; and defendants each deny that the buildings and structures described in the Complaint caught fire from burning gasoline flames. Defendants Standard Oil Company and Odermatt each admit that the buildings and structures described in Paragraph VI of the plaintiff's Amended Complaint were destroyed by said fire, but each of said defendants deny that said buildings were destroyed by a fire resulting from burning gasoline flames.

As to Paragraph VI of the Amended Complaint: The value of said destroyed buildings and the amount of damage resulting from the destruction

by said fire are matters which will have to be determined by the jury from the evidence adduced at the trial.

As to Paragraph VII of the Amended Complaint, each of said defendants contend that they have no knowledge of the contents of said destroyed buildings or of the ownership or value thereof, and that the said matters are questions which will have to be decided by the jury from the evidence adduced at the trial.

As to Paragraph VIII of the Amended Complaint, each of the defendants admit that the said buildings were located adjacent to Mineral Hot Springs and abutting upon United States Highway No. 93 at a point north of Contact, Nevada. Each of the defendants deny all other matters and things alleged in said Paragraph VIII.

Wherever the pleadings show the name "O. J. Odermatt," said pleadings should read "E. J. Odermatt."

The trial of this case will be held at Carson City, Nevada, before a jury in the courtroom of the above-entitled Court on the 6th day of February, 1950, at 10:00 a.m.

Dated: This 20th day of October, 1949.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed October 20, 1949.

JURY'S REQUEST FOR EXPLANATION OF
INSTRUCTION No. 22

Your Honor Judge Foley—

The jury cannot interpret the Instruction #22 with reference to inference which seems to be somewhat vague as our position as to form of evidence and the burden upon the plaintiff or the defendant.

“The proximate cause of an event is distinguished from a remote cause * * *.” (Instruction 21) “If you do not find the driver was negligent, your verdict should be for the defendants. If he were negligent, but his negligence was not the proximate cause of the fire, etc. (Inst. 21) An interpretation would.

/s/ RUSSELL MILLS,
Foreman.

[Title of District Court and Cause.]

EXPLANATION REQUESTED BY JURY
OF INSTRUCTION No. 22

The following is an attempt to answer your question in regard to Instruction No. 22:

Due to the fact that the cause of the fire is not shown by any direct evidence in this case, Instruction No. 22 declares that the plaintiff has the burden to prove by a preponderance of the evidence that none of the instrumentalities under plaintiff's control caused the fire. And the instruction goes on to say that if you find from the evidence that none of

the appliances did cause the fire and if you find from the evidence that shortly after noon on the 3rd day of May, 1947, the defendant E. J. Odermatt, through an assistant, was delivering gasoline to the plaintiff, and that said gasoline became ignited and flames spread to buildings and destroyed the buildings, and if you find that as a proximate result of that fire plaintiff has suffered damage, you are instructed as follows: That an inference then arises that the proximate cause of the fire was some negligent conduct on the part of the defendant Odermatt, or his assistant. That inference is a form of evidence. If you do not find any evidence contrary to the inference, the inference would support a verdict for the plaintiff. If there is evidence contrary to the inference, such inference and the contrary evidence must be weighed, having in mind that it is not necessary for a defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference must have greater weight, more convincing force in the mind of the jury than the opposing explanation offered by the defendant.

If such a preponderance in plaintiff's favor exists, then the verdict should be for the plaintiff; but if it does not exist, if the evidence preponderates in defendants' favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither

having the more convincing force, then the verdict should be for the defendants.

Proximate cause is that which in natural sequence produces a specific result, no other or independent things intervening—in other words, the real, actual or responsible cause.

The explanation now offered to you must be considered by you in connection with all the other instructions given.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed February 18, 1950.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Instruction No. 1

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system the Court and the jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct those mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the

law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass upon the facts of the case, upon the credibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just a little inclined to interfere with the province of the jury passing upon the facts of the case, as it is sensitive about having the jury undertake to determine what is the law of the case. With this understanding of our respective duties, the Court states to you the following general principles.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 2

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all others.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 3

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted.

You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 4

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 5

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You must each decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 6

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 7

Passion, prejudice and sympathy have no place in your considerations or in your deliberations. The fact that one of the defendants is a corporation cannot and must not be considered by you. It is entitled to the same fair treatment and the same consideration at your hands as a private individual, no more and no less. It is your duty, without sympathy, prejudice or passion, to calmly consider the evidence as to how the fire occurred and upon a consideration of the evidence and the law applicable thereto render your verdict. In considering the evidence and attempting to determine the truth of the matter in controversy, you should not be influenced by sympathy for the plaintiff or prejudice against the defendants, nor by the fact that the plaintiff is a private individual and the defendant Oil Company a corporation. It is your duty to base your verdict solely and entirely upon the evidence and the law as I have given them in these instructions.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 8

In civil actions, and this is a civil case, the party who asserts the affirmative of an issue must carry the burden of proving it. In other words the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against the party asserting it. When the evidence

is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. Should the conflicting evidence on either side of the issue be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative side of the issue.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 9

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not

in the relative number of witnesses, but in the relative convincing force of the evidence.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 10

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 11

In judging the credibility of witnesses you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by the evidence that pertains to his motives.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 12

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence you shall believe that the probability of truth favors his or her testimony in other particulars.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 13

Discrepancy in a witness' testimony or between his testimony and that of others, if there were any, does not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 14

The issues to be determined by you in this case are these:

First: Was the assistant of the defendant E. J. Odermatt negligent?

If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you have a second issue to determine, namely:

Was that negligence a proximate cause of any damage to the plaintiff?

If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you should then fix the amount of plaintiff's damage and return a verdict in plaintiff's favor against the defendant E. J. Odermatt; you then should find on a third question:

Was the defendant E. J. Odermatt a servant or employee of the defendant Standard Oil Company of California?

If you answer that question in the negative, you should not return a verdict against Standard Oil Company of California, but if you answer it in the affirmative, you then should determine a fourth question divided into parts (a) and (b), namely:

(a) Was it inherently necessary in the business of distributing petroleum products to employ assistants, or

(b) Did the defendant Standard Oil Company of California have notice of the employment of the assistant Lee Nielsen by the defendant E. J. Odermatt and make no objection to such employment?

If you answer both part (a) and part (b) in the negative, then you should not return a verdict against defendant Standard Oil Company of California, but if you answer either part (a) or part (b) in the affirmative and you have previously found in the plaintiff's favor on the other issues, your verdict should be in plaintiff's favor against both the defendant E. J. Odermatt and the defendant Standard Oil Company of California.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 15

In this action there are two defendants, one of whom, Standard Oil Company of California, is sued upon the theory that the other, E. J. Odermatt, was its servant at the time of the events out of which the accident occurred. If you find that E. J. Odermatt is not liable, then you will not have to consider the nature of his relationship with Standard Oil Company of California, because in that event the Company may not lawfully be held liable even if E. J. Odermatt was its servant. But if you find the defendant E. J. Odermatt liable, then it will become necessary for you to determine whether at the time of the accident he was a servant of Standard Oil Company or whether he was acting for it as an independent contractor. The employer of a servant is liable to third persons for negligence of his servant, if the servant himself is liable, but the em-

ployer of an independent contractor is not liable to others for negligence of the contractor.

Both a servant and an independent contractor perform services for another person, but there is a very important distinction between them. An independent contractor is one who performs service for another under an arrangement which obligates him as to the results to be accomplished and who is under the employer's control only as to such results, but who is not subject to control as to his physical movements, conduct and methods of doing the job. A servant on the other hand is one who is engaged to render services within the scope of such arrangement as he and the one who engages him may agree and he may be paid either wages, commissions or otherwise, and who performs such services subject to the right of control by the employer as to the details, conduct, method and manner of doing the job. The relation of master and servant exists when one is a servant as herein defined.

An independent contractor is at liberty to consider and follow any suggestions that his employer may make, and his employer may make any suggestions or requests prompted by his own wishes, but these things do not change an independent contractor into a servant so long as he retains the right of control over his physical movements, conduct and method of doing the job.

Given :

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 16

The contract between the defendant Odermatt and the defendant Standard Oil Company of California contains the statement that the defendant Odermatt is an independent contractor and not a servant of the defendant Standard Oil Company of California, and statements to the effect that the defendant Standard Oil Company of California shall not be liable for injury or damage caused by the negligence of the defendant Odermatt or his employees. These statements, of themselves, neither establish that the defendant Odermatt is, in fact, an independent contractor, nor do such statements, of themselves, relieve the defendant Standard Oil Company of California from liability for injury or damage to the plaintiff, if such injury or damage is caused by the negligence of the defendant Odermatt or his assistant. In determining whether, at the time of the fire at Mineral Hot Springs, the defendant Odermatt was an independent contractor or a servant of the defendant Standard Oil Company of California, you are to consider the entire contract together with all of the facts and circumstances surrounding the relationship between the two defendants; and you are to decide, from said contract and from all such facts and circumstances, which of the defendants has the right and power, as a practical matter, to control the actions of the defendant Odermatt in the details, conduct, method and manner of sale and delivery of the petroleum products of the defendant Standard Oil Company of California. If the defendant Standard Oil Com-

pany of California had such right and power, whether it had been exercised or not, you should find that the defendant Odermatt was a servant of the defendant Standard Oil Company of California is liable for any injury or damage to the plaintiff found by you to have been proximately caused by the negligence, if any you find, of the defendant Odermatt or his assistant while acting within the scope of their authority.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 17

The plaintiff is not bound by any agreement between the defendant E. J. Odermatt and the defendant Standard Oil Company of California limiting the liability of the defendant Standard Oil Company of California for negligence of the defendant E. J. Odermatt or his assistant or assistants unless it is shown that the plaintiff had knowledge of such agreement.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 18

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively established the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact, which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

It is noted that the inference arises only from established foundation facts. The inference itself cannot supply the foundation facts from which the inference arises. Liability cannot result from an

inference upon an inference or a presumption upon presumption.

Given :

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 19

At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof.

Given :

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 20

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science

or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 20-A

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 21

The mere fact that an accident happened—that the fire happened—considered alone, does not support an inference that some party, or any party, to this action was negligent. The burden is upon the plaintiff in this case to prove by a preponderance of the evidence not only that the driver who

delivered the gasoline was negligent in the way he delivered it, but also that his negligence if any was the proximate cause of the fire.

The proximate cause of an event is distinguished from a remote cause, and means that which, in a natural and continuous sequence, unbroken by any new cause, produces the event.

If you do not find the driver was negligent, your verdict should be for the defendants. If he were negligent, but his negligence was not the proximate cause of the fire, your verdict should still be for the defendants.

If the fire did occur due to some cause other than the driver's negligence, then the plaintiff should not recover, whether the driver was negligent or not.

Given :

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 22

If you believe from the evidence that the plaintiff Herzinger owned or controlled the underground storage tanks and the appliances in the buildings including all electric wiring, power plant, oil refrigerator, electric refrigerator, butane water heater, butane stove, motor in panarame machine, motor in juke box, refrigerator compressor and motor, then the plaintiff has the burden in this case to prove by a preponderance of the evidence that the fire was not caused by said appliances or any of them, or by any defect in any of them. If you find that the fire was not caused by any of those

appliances, and if you further find that there was an accidental occurrence as claimed by plaintiff, namely: That shortly after noon on the 3rd day of May, 1947, the defendant E. J. Odermatt through an assistant was delivering gasoline to the plaintiff and that said gasoline became ignited and flames spread to buildings owned by the plaintiff destroying them; and if you should find that from that accidental event, as a proximate result thereof, plaintiff has suffered damage, you are instructed as follows: An inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant, E. J. Odermatt or his assistant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant E. J. Odermatt, to rebut the inference by showing that he or his assistant did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure on his part or on the part of his assistant.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 23

In determining whether the defendant E. J. Odermatt's assistant Lee Nielsen was negligent you may consider, as bearing upon this question, whether the said Lee Nielsen left the tank truck unattended at a time when gasoline was flowing from the tank truck to the underground tank, providing you find that Lee Nielsen's absence from the tank was the proximate cause of the fire.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 24

If, adhering to the Court's instructions, you should find that plaintiff is entitled to a verdict against the defendant, E. J. Odermatt or the defendants E. J. Odermatt and Standard Oil Company of California, it then will be your duty to award plaintiff such amount of damages as will compensate him reasonably for all detriment suffered by him which was proximately caused by the negligence of the defendant, E. J. Odermatt or his assistant, whether such detriment could have been anticipated or not.

Should your decision be to award damages to the plaintiff, in arriving at the amount of the award, you shall determine each of the items of claimed detriment which I now am about to mention, provided that you find it to have been suffered by him and as a proximate result of the negligence of the defendant E. J. Odermatt or his assistant.

Such sum as will reasonably compensate said plaintiff for damages to his buildings, furniture, fixtures and equipment; currency and silver; and stock of merchandise. That sum is equal to the difference in the fair market value of the property immediately before and after the injury; provided, however, that if the injury has been repaired, or be capable of repair, so as to restore the fair market value as it existed immediately before the injury, at an expense less than such difference in value, then the measure of damage is the expense of such repair rather than such difference in value. Even if you should find that property of said plaintiff was damaged in the accident beyond repair, but that nevertheless it had a market value after the accident, as to such property you will award said plaintiff a sum equal to the difference between the fair market value of the property as it was immediately before the accident and its fair market value in its damaged condition following the accident. In determining the sum that will reasonably compensate said plaintiff for damages to his buildings you may consider the cost of replacing said building.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 25

When one does not use reasonable diligence to care for his own property and any damage is thereby aggravated as a result of such failure, the liability

of another whose negligence may have been a proximate cause of the original injury should be limited by the amount of damages that would have been suffered if the injured party himself had exercised the diligence required of him.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 26

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you should not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 27

You will be given forms of verdicts for both plaintiff and defendants.

I hereby instruct you that you may bring in a verdict for the plaintiff against both defendants, or for the plaintiff and against the defendant E. J. Odermatt alone, or for both the defendants.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 28

Your verdict must be unanimous. When you retire to the jury room to deliberate you will select one of your number as foreman and he or she will sign your verdict for you. You will then return into court with the verdict. Your foreman will represent you as your spokesman in the further conduct of this case in the court. The Clerk will hand you the forms of verdict.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed February 17, 1950.

In the District Court of the United States of
America, in and for the District of Nevada

EDWARD HERZINGER,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFOR-
NIA, a Corporation, and E. J. ODERMATT,
Defendants.

VERDICT

We, the jury in the above entitled cause, find for
the defendants E. J. Odermatt and Standard Oil
Company of California.

Dated: This 18th day of February, 1950.

/s/ RUSSELL MILLS,
Foreman.

[Endorsed]: Filed February 18, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves the Court to set aside the
verdict returned in the above entitled action on
February 18, 1950, and the Judgment entered
therein on February 18, 1950, and to grant a new
trial on the following grounds:

1. The evidence was insufficient to justify the
verdict in that there was no substantial evidence to

show that defendant Odermatt or his assistant in the delivery of gasoline to the plaintiff on May 3, 1947, exercised due care, and in fact the evidence disclosed as a matter of law that defendant Odermatt's assistant was negligent.

2. The Court erred in overruling plaintiff's objection to the testimony of the witness Jacob A. Ryan, under which rulings of the Court the witness was permitted to invade the province of the jury and to answer hypothetical questions which did not contain all of the elements of fact established by the evidence in this case and which contained certain elements of fact not established by such evidence.

3. The Court erred in refusing to instruct the jury that: "If you find that the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California but the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants then the defendant Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California," as requested by plaintiff.

4. The Court erred in explaining instructions No. 21 and 22 by instructing the jury over plaintiff's objection that: "Plaintiff's burden of proving

negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," such instruction being, under the circumstances, misleading and prejudicial to plaintiff.

This motion is based upon the records and proceedings in this action.

/s/ ORVILLE R. WILSON,

/s/ R. P. PARRY,

/s/ J. R. KEENAN,

/s/ T. M. ROBERTSON,

/s/ JOHN H. DALY,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 27, 1950.

[Title of District Court and Cause.]

NOTICE OF COURT'S DECISION ON MOTION
FOR NEW TRIAL

To Edward Herzinger, Plaintiff Above Named, and
to Parry, Keenan, Robertson & Daly, and to
Orville Wilson, His Attorneys:

You, and Each of You, Will Please Take Notice that on the 23rd day of June, 1950, the above entitled Honorable Court entered its order denying your motion to set aside the verdict returned in the above-entitled action on February 18, 1950, and the judgment entered therein on said day and to grant a new trial.

Dated at Reno, Nevada, this 26th day of June, 1950.

GRISWOLD, REINHART &
VARGAS,

A. L. PUCCINELLI and

JOHN S. HALLEY,

By /s/ JOHN S. HALLEY,

Attorneys for Defendant

O. J. Odermatt.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 3, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That Edward Herzinger, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment entered in this action on February 18, 1950, and from the order denying plaintiff's motion for new trial entered in this action on June 23, 1950.

/s/ ORVILLE R. WILSON,

/s/ R. P. PARRY,

/s/ J. R. KEENAN,

/s/ T. M. ROBERTSON,

/s/ JOHN H. DALY,

Attorneys for Plaintiff.

[Endorsed]: Filed July 21, 1950.

In the District Court of the United States,
in and for the District of Nevada

No. 680

EDWARD HERZINGER,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFOR-
NIA, a Corporation, and E. J. ODERMATT,
Defendants.

Before: Hon. Roger T. Foley, Judge.

February 8 to 16 Incl., 1950
Carson City, Nevada

TRANSCRIPT OF TESTIMONY

Be It Remembered, That the above-entitled mat-
ter came on regularly for trial before the Judge
sitting with a jury, at Carson City, Nevada, on
Wednesday, the 8th of February, 1950, at 10:00
o'clock a.m.

Appearances:

PARRY, KEENAN, ROBERTSON &
DALY, By

R. P. PARRY, ESQ.,

JOHN H. DALY, ESQ., and

ORVILLE R. WILSON, ESQ.,
Attorneys for Plaintiff.

SAMUEL PLATT, ESQ.,

Attorney for Defendant Standard Oil
Company of California.

JOHN S. HALLEY, ESQ.,

A. L. PUCCINELLI, ESQ.,

GEORGE L. VARGAS, ESQ.,

Attorneys for Defendant
E. J. Odermatt.

The following proceedings were had:

Mr. Daly: Call the defendant Odermatt under Rule 43(b), if the Court please.

E. J. ODERMATT

being duly sworn, testified as follows:

Direct Examination

By Mr. Daly:

Q. Will you state your name?

A. E. J. Odermatt.

Q. Where do you reside, Mr. Odermatt?

A. Wells, Nevada.

Q. What is your business?

A. I operate two lines for the Standard Oil Company as a wholesale distributor.

Q. I presume then that you sell petroleum products out of Wells that are consigned to you by the Standard Oil Company of California?

A. That is right.

Q. And you were so engaged in May of 1947, is that correct?

A. Yes, sir.

(Testimony of E. J. Odermatt.)

Q. What territory do you have, Mr. Odermatt?

A. Well, I have the whole—let us see—well, our boundary runs to the Idaho line from Wells as far west as Deeth and as far east as Pequop Summit, and to the south it comes through just before you come to Currie and runs through to the White Pine County line, takes in all of Ruby Valley.

Q. Ruby Valley then is the general territory, in addition to [2*] that north?

A. Yes, that is south of Wells.

Q. And that territory, I presume, is fixed by the Standard Oil Company, is that correct?

A. That is right. They have several plants throughout that part of the country and each distributor is given territory that he operates.

Q. And the limits of the territory are fixed by the Standard Oil Company?

A. That's right.

Q. How many outlets did you have in that area, Mr. Odermatt, do you know?

A. Total outlets of all types?

Q. Take first the dealers, the service station operators? A. Seven.

Q. And then what other outlets do you have?

A. Well, we have, I would say, approximately 150 outlets.

Q. You say one hundred fifty?

A. Approximately, yes.

Q. Those are in this large area that you told us about? A. That's right.

(Testimony of E. J. Odermatt.)

Q. I presume they are ranchers—is that one class of your outlet?

A. Practically all of our trade are either home accounts in town or out of town and agriculture and dealer. [3]

Q. When you forward petroleum products to a dealer or service station operator, you make out an invoice, I presume? A. Right, correct.

Q. Were the forms for those invoices furnished by the Standard Oil Company of California?

A. That's correct.

Q. Handing you, Mr. Odermatt, what has been marked for identification as Plaintiff's Exhibit 1, I will ask you to state if that is a typical invoice prepared by either you or one of your employees for the delivery of petroleum products to dealers?

A. That is a typical invoice, yes.

Q. Can you tell us what particular outlet that exhibit refers to?

Mr. Platt: May I see the exhibit before we make inquiries?

The Court: Yes. I think it would be better to introduce it before we give it to the witness.

Mr. Daly: It should have been offered, yes, and I will do that at the present time, if the Court please.

Mr. Platt: We have no objection.

Mr. Halley: No objection.

The Court: It will be admitted as Plaintiff's Exhibit No. 1.

Q. Now I will ask you again, Mr. Odermatt, if

(Testimony of E. J. Odermatt.)

you can tell us [4] what particular outlet that exhibit shows delivery of products?

A. Shows delivery to Ed Herzinger, Contact, Nevada.

Q. How many copies of those invoices were prepared, Mr. Odermatt? A. Five.

Q. And how many of those went to Standard Oil Company of California?

A. That varies, depending on the type of delivery. On credit delivery, two of them. On cash delivery, we sent one, or two dealer accounts—I will correct that—on dealer accounts we send two, regardless of whether it is credit or cash.

Q. And this was a dealer account, is that correct? A. That is correct.

Q. What departments were the two copies sent to of Standard Oil, do you know?

A. I do not know.

Q. What do you do with them?

A. We send them in to the district office at Salt Lake City. Where they go from there, I am not in a position to say.

Q. Now in the case of a dealer account, Mr. Odermatt, do you collect for the petroleum products delivered?

A. That is a general practice on dealer accounts, to collect cash on every delivery.

Q. By cash I presume you are including checks?

A. Checks. We take in credit cards as cash, credit card slips. [5]

Q. You spoke of credit cards, Mr. Odermatt,

(Testimony of E. J. Odermatt.)

how did you handle the produce, or reimburse for the produce, that a dealer would let out on a credit card of Standard Oil Company?

A. We have a regular form, we call S-29 form, that we list all credit card slips on that form and take that in as a credit and the dealer is given a copy.

Q. Handing you what has been marked Plaintiff's Exhibit 2 for identification, I will ask you if that is a typical form which you were testifying about, the S-29? A. That is right.

Q. And that is typical? A. That's right.

Q. You stated also that you collected for the Standard Oil and you did it by cash, which would include checks. I will ask you, Mr. Odermatt, if Plaintiff's Exhibit 3 for identification is a check given you by Mr. Herzinger for Standard Oil products delivered?

A. Yes, I would say that is a check.

Q. And was that check handled by you in the same manner as other payments received for petroleum products of Standard Oil?

A. That's right.

Mr. Daly: We will offer in evidence Plaintiff's Exhibits 2 and 3.

Mr. Platt: May I inquire a moment, your Honor?

The Court: Yes, sir. [6]

Q. (By Mr. Platt): Are you acquainted with Mr. Herzinger's signature?

A. I wouldn't be able to identify it. The thing

(Testimony of E. J. Odermatt.)

I looked at there, Mr. Platt, we have an endorsement stamp that we use on checks and I do recognize that particular stamp.

Q. You recognize the endorsement stamp?

A. Yes. As far as the signature, I wouldn't swear to Mr. Herzinger's signature. I have seen it many times and I have received quite a few checks from Mr. Herzinger.

Q. But you are fairly certain Mr. Herzinger gave you that check? A. Yes.

Q. And with respect to Plaintiff's Exhibit No. 2 for identification, there again appears what purports to be the signature of Mr. Herzinger?

A. Yes.

Q. I suppose you cannot recognize that?

A. No, I wouldn't say that is Mr. Herzinger's signature. That is probably some employee that signed that for him. That is the customary form that we do pick up from our dealers. This was an older form. At that time the dealer was not required to sign this. The new form the dealer is required to sign at the time we pick it up.

Q. Can you identify this form as outlining and stating upon it the delivery of gasoline of Mr. Herzinger and the sale of [7] gasoline by him at that particular time mentioned?

A. The only thing, this is mentioned August 2, 1946. It was a customary practice to pick these up and allow the dealer the same as cash for them. In other words, we honor the credit cards that he has

(Testimony of E. J. Odermatt.)

taken in, either for his bill or for merchandise, the same as cash.

Q. Can you testify whether this exhibit form was in full force and effect at or about the first day of May, 1947?

A. That same form at that time was being used.

Q. Was being used?

A. Yes, that was being used at that time.

Q. And when these forms were signed, did you keep them in your files?

A. We sent one copy to Salt Lake and kept one copy in our own files.

Mr. Platt: I think that is all, your Honor. I have no objection to the exhibits.

Mr. Halley: No objection.

The Court: Exhibit 2 and Exhibit 3 will be admitted in evidence.

Q. (By Mr. Daly): I might ask you, Mr. Odermatt, if your signature appears on Exhibit No. 2?

A. No, that is not my signature. That is my wife's signature.

Q. She was signing these for you?

A. She does my office work. [8]

Mr. Daly: At this time I would like to give these exhibits to the jury. I wonder if it might be agreed to by the Court and counsel that as to these, and all exhibits, that reading of the exhibits may be

(Testimony of E. J. Odermatt.)

waived and counsel may refer to the exhibits at any time during the trial.

Mr. Platt: Your Honor, please, I have in mind certain exhibits——

The Court: It might be a little bit hazardous to adopt that as a general rule. Something might come in that you would want to read to the jury.

Mr. Daly: The only thing I have reference to, I didn't want a waiver of the right to refer to the exhibits by not reading them to the jury at the time they were introduced.

The Court: Is that a reasonable suggestion, Mr. Platt?

Mr. Platt: Well, I have in mind submitting and offering in evidence certain exhibits, portions of which I expect to read to the witness for the benefit of the jury and your Honor. Of course, if an exhibit is admitted in evidence, I assume that under prevailing practice it may be used as evidence and may be argued to the jury upon the argument of the case.

The Court: Also may be taken by the jury to their jury room unless it is in the nature of a deposition.

Mr. Halley: That could be clarified in this way, if the Court please, that we waive the right to read them to the [9] jury when they are introduced, but reserve the right to read them at any time we may select.

The Court: How is this for a suggestion—that

(Testimony of E. J. Odermatt.)

we leave to counsel's discretion as to reading them, with the understanding no right to use the exhibits or portions of them is waived.

All Counsel: That is agreeable.

Q. Now, Mr. Odermatt, what did you do with the money that you collected for petroleum products of Standard Oil Company?

A. What do you mean by money?

Q. Checks or cash?

A. Well, the checks were sent to the Standard Oil office in Salt Lake daily. The cash was deposited in the bank and a check drawn on that in the same amount that was deposited and mailed with the checks to Salt Lake.

Q. Did you do that every day?

A. That's right.

Q. Is it correct, Mr. Odermatt, that you were instructed by the Standard Oil Company of California not to sell petroleum products on credit unless those credits were approved by the Standard Oil Company?

Mr. Platt: That question, if the Court please, assumes something in evidence that is not in evidence. Of course, it is a leading question besides and we object on those two grounds. [10]

The Court: This is sort of a cross-examination.

Mr. Daly: It is.

The Court: Objection will be overruled. Answer the question.

Q. Do you remember the question?

A. Well, I couldn't answer the question yes or

(Testimony of E. J. Odermatt.)

no, the way you state it, because the Standard Oil Company allows me to sell on credit at their risk if they give their approval first. If I sell without their approval, I sell at my risk.

Q. I think that straightens the matter out, thank you. Now how were you paid for your services rendered Standard Oil, Mr. Odermatt?

A. I was paid by a commission at the end of each month.

Q. And that was based, I presume, on the amount of petroleum products you sold?

A. That's right.

Q. In addition to selling products for Standard Oil Company, Mr. Odermatt, did you also collect rent for the company owned facilities on the property of Mr. Herzinger?

A. Collected rentals that were issued by statement monthly, yes.

Q. You speak of a statement showing rentals. I will hand you Plaintiff's Exhibit 4 marked for identification, and ask you what that is?

A. That is an invoice billing the rental on this particular [11] property.

Q. Does your signature appear on there?

A. Yes.

Q. Was this the type of invoice which was in use at the date of May 1, 1946, and also at the time of the fire up there?

A. I wouldn't say it is exactly; I think it is the same. It is the same one that was in use at that time.

(Testimony of E. J. Odermatt.)

Q. This method of collecting the rent was the same at the time of the fire, is that correct?

A. Yes, sir.

Mr. Daly: I offer Plaintiff's Exhibit No. 4 in evidence.

Q. (By Mr. Platt): Mr. Odermatt, there appears on this alleged invoice rent on SS6441 for May, 1946, four six six, what does that mean?

A. That is the particular service station number outlet.

Q. For what was the rent collected?

A. That was for use or rental on two pumps that are located on the premises.

Mr. Platt: We have no objection.

Mr. Halley: No objection.

The Court: It may be admitted, No. 4.

Q. (By Mr. Daly): I ask you, Mr. Odermatt, if these forms, which are Plaintiff's Exhibits 1, 2 and 4, are the forms which were in use by the Standard Oil Company of California at the time of [12] the fire at Mineral Hot Springs?

A. These are the forms in use in 1946. I would say they are similar to forms in use in 1947.

Q. Was the method of doing business, as far as you and the Standard Oil Company of California are concerned, any different at the time of the fire than it was at the date of the exhibits there?

A. No.

Q. You had employed, I believe, as one of your drivers, Lee Nielson in May of 1947, is that correct?

A. That is correct.

(Testimony of E. J. Odermatt.)

Q. How long had he been helping you with the delivery of petroleum products?

A. I would say approximately one year at that date.

Q. Did any representative of Standard Oil Company of California ever object to your employment of Lee Nielson in his delivery of petroleum products for you? A. No, sir.

Q. Was Mr. Nielson making a delivery of petroleum products to your Mineral Hot Springs on the date of the fire, May 3, 1947?

A. Mr. Nielson had made delivery, the delivery was completed.

Q. But he was the one who took the petroleum products there? A. That's right.

Mr. Daly: That's all. [13]

Cross-Examination

By Mr. Platt:

Q. As I understand you, you employed Mr. Nielson independently of any suggestions made by the Standard Oil Company of California?

A. That is right.

Q. Standard Oil never suggested the name of any individual employee in your service?

A. No, sir.

Q. Under your relations with Standard Oil Company of California, did you have exclusive right and privilege of employing such employees as you thought were necessary for the conduct of your business?

(Testimony of E. J. Odermatt.)

A. Yes, I was never told anything to the contrary.

Q. You were asked the question whether Standard Oil Company of California objected to the employment of Mr. Nielson and you testified that they did not. Well, as a matter of fact, they didn't even suggest your employment of Mr. Nielson, did they?

A. That's right.

Q. And that you had the exclusive and independent right and privilege to employ Mr. Nielson or anybody else you saw fit? A. That's right.

Q. Without any control whatever on the part of Standard Oil? A. That's correct.

Q. Who paid Mr. Nielson? [14]

A. I paid him myself.

Q. Standard Oil didn't pay Mr. Nielson for services rendered you? A. No, sir.

Q. You paid Mr. Nielson personally and out of your own private pocket? A. Yes.

Q. Who owned and operated the trucks that you use in the service?

A. They are my own personal trucks.

Q. None of them were owned by Standard Oil Company of California? A. No, sir.

Q. Who paid for the maintenance of those trucks or repairs upon the trucks?

A. That was my responsibility.

Q. Standard Oil was under no obligation at all to incur that expense? A. That's right.

Q. All that expense was incurred by you independently? A. Yes, sir.

(Testimony of E. J. Odermatt.)

Q. Out of your own private pockets?

A. Yes, sir.

Q. Did you have any other employees in and about the business which you operated? [15]

A. The only employee outside myself was my wife, who takes care of our office work.

Q. And she received wages or compensation for services rendered? A. Yes, sir.

Q. And who paid her? A. I paid her.

Q. Standard Oil paid no part or portion of her wages? A. That's correct.

Q. When you collected monies for the sale of gasoline, Mr. Odermatt, you say that some of the receipts were in checks and others were in cash. Have you a private account in any bank any place in which you deposit checks or monies or cash received for the sale of gasoline?

A. We deposit no checks made out to Standard Oil Company in our account.

Q. In your personal account?

A. That's right. When we deposit the cash in our personal account, we issue Standard Oil Company a personal check to cover.

Q. Let me see if I understand that. The checks and the cash that you collected for the sale of petroleum products were deposited in your personal account?

A. No, sir. The checks were mailed to Salt Lake daily. The cash was deposited in our personal account and we drew a check [16] on our personal account in the equivalent amount.

(Testimony of E. J. Odermatt.)

Q. Then the checks were endorsed and sent to Salt Lake? A. That's right.

Q. And the cash deposited in your personal account?

A. And check issued covering it.

Q. And then you issued checks to the Standard Oil Company for the particular invoice or invoices represented by the checks?

A. In an equivalent amount for each day's business.

Q. I understood you to state that Standard Oil paid you for your services a commission?

A. That's right.

Q. That is the way you received your compensation? A. That's right.

Q. I also understood you to say that you are privileged to give some of your patrons credit, is that true?

A. We were privileged to give anybody credit that they would endorse or we had credit approval, then that would be their responsibility. They didn't tell us we could give credit to anybody. If we gave credit without an endorsement, it was our responsibility. In other words, if the bill was not paid or——

Q. (Interrupting): You had the right to give credit to anybody you saw fit, providing you assumed the responsibility of a bad debt, is that the idea? A. That's right. [17]

Q. And you enjoyed that privilege during the

(Testimony of E. J. Odermatt.)

years 1946 and 1947 and up to the time that this fire occurred? A. That's right.

Q. Now, Mr. Odermatt, you were, prior to the occurrence of the fire here, under written contractual relations with the Standard Oil Company of California, were you not?

A. That is correct.

Q. I hand you here what purports to be an original wholesale distributor agreement, entered into on the 26th day of August, 1944, between Standard Oil Company of California and yourself, and will ask you if you recognize your signature on this agreement and state whether it is the original agreement entered into?

A. Yes, sir, that is my signature.

Mr. Platt: We offer it in evidence, your Honor.

Mr. Parry: May we see it? I wonder if at some other time——

The Court: We could defer the ruling. Would it interrupt your examination? Any objection to proceeding with your examination, subject to motion to strike if the exhibit is rejected?

Mr. Platt: No objection.

The Court: You will proceed then, Mr. Platt.

Q. Mr. Odermatt, there seems to be included, as part of this agreement, some additional documents and papers, together with [18] a plat or a map——

The Court: Perhaps this agreement had better be marked for the record as Standard Oil proposed Exhibit A for identification.

Q. (Continuing): ——and three or four other

(Testimony of E. J. Odermatt.)

documents. Will you state, Mr. Odermatt, whether your signature appears on all of those additional documents? A. Yes sir.

Q. And they are likewise signed by a representative of Standard Oil Company of California?

A. Well, there are some of these—I believe all of them are. I didn't pay that particular attention. They are all signed except one, which was a termination of an old one and starting a new one.

Mr. Platt: Well, if counsel have any exception or objection with reference to statement on that other paper, we will hear from you later.

Mr. Wilson: Thank you.

Q. Mr. Odermatt, I want to call your attention to this wholesale distributor agreement which you have just identified, without reading the entire agreement, which I may be required to do if counsel for the other side insists upon it—I want to call your attention to three paragraphs of this agreement. The first paragraph to which I desire to call your attention reads as follows: "Distributor shall pay and bear all the expense of [19] operating said plant, including, but without limiting the generality of the foregoing expense of storing, handling, selling and delivery of said products, light, water, power, telephone, telegraph, postage, money orders, heat and salaries, or other compensation of distributor's employees. Distributor shall pay all license fees and taxes on motor equipment which distributor uses for the sale and delivery of company's products." You, of course, have been familiar with that paragraph in this agreement?

(Testimony of E. J. Odermatt.)

A. That's right.

Q. And will you state whether or not the terms and conditions in those paragraphs are scrupulously observed and carried out by you?

A. Yes, I took care of the obligations personally. With reference to the plant, the Standard Oil Company owns the buildings and tanks themselves. All the rest——

Q. (Interrupting): But with respect to the expenses and the financial responsibilities and obligations to your employees and other expenses, you have acted in accordance with the provision of this paragraph? A. That's right.

Q. Now I want to read another short paragraph to you out of this agreement: "It is understood and agreed that distributor, in the performance of this agreement, is engaged in an independent business and nothing herein contained shall be construed [20] as reserving to company any right to control the distributor with respect to its physical conduct in the performance of this agreement." May I ask you, Mr. Odermatt, whether, during the life of this agreement, Standard Oil Company of California has made any attempt at all to control you with respect to your physical conduct in the performance of the agreement? A. No, sir.

Q. Now in addition to that, I desire to call your attention to another short paragraph in this agreement, which reads as follows: "Distributor undertakes and agrees that he will, at his own expense, during the terms hereof, maintain full insurance

(Testimony of E. J. Odermatt.)

under any workmen's compensation laws effective in said State covering all persons employed by and working for him in connection with the performance of this agreement, and upon request shall furnish company with satisfactory evidence of the maintenance of such insurance." May I ask you whether or not, during the life of this agreement, under your own expense you have maintained full insurance under any workmen's compensation laws in force in this State?

A. Yes, we carry insurance with the Nevada State Industrial Insurance.

Q. Following that is another paragraph, which reads as follows: "Distributor accepts exclusive liability for all contributions and payroll taxes required under the Federal Social Security Act and State Unemployment Compensation laws to all persons employed by [21] and working for him in connection with the performance of this agreement." During the life of this agreement, Mr. Odermatt, have you acted in accordance with the provisions and conditions of that paragraph? A. I have.

Q. And you have performed the functions and the federal requirements under the Social Security Act and also the State Unemployment Compensation laws, and have at your own expense and effort carried out the provisions of this paragraph?

A. Yes, sir.

Q. Without demanding or expecting from the Standard Oil any compensation therefor?

A. That's right.

(Testimony of E. J. Odermatt.)

Q. I would like to read another paragraph of this agreement: "Distributor shall indemnify and hold company harmless from and against any and all liability of whatever kind and nature for damage to property, including the products and property of company, or for injury or death of any persons arising out of or in any way connected with any act or acts of distributor or distributor's employees under this agreement, or in the operation of any vehicle or vehicles hereunder, provided, however, that in the absence of negligence distributor shall not be held responsible for any loss of or damage to the property and equipment of company caused by fire or other causes beyond distributor's power."

You have always understood that paragraph, have you [22] not, Mr. Odermatt?

A. Yes, sir.

Q. And recognize it now?

A. Yes, sir.

Q. I want to call your attention to another paragraph of this agreement: "Distributor shall secure and maintain, at his own expense, during the term hereof, automobile public liability insurance with limits of not less than twenty-five thousand dollars for injury to any one person, and subject to such limitation not less than fifty thousand dollars for injuries arising out of any one action, and property damage automobile insurance of limit of not less than five thousand dollars. Such insurance shall cover all automobiles, trucks, trailers operated by distributor in the performance of distributor's obligations under this agreement. Distributor shall furnish company with satisfactory evidence of the

(Testimony of E. J. Odermatt.)

maintenance of such insurance." May I ask you, Mr. Odermatt, whether, during the life of this agreement, you have taken out and maintained automobile insurance in accordance with the provisions of this paragraph?

A. Yes, sir, we have carried insurance.

Q. And you are still carrying it?

A. That's right.

Q. And have you given the company satisfactory evidence of this fact? A. Yes, sir. [23]

Mr. Platt: For the moment, your Honor, that is all I desire to read from this agreement.

Q. Mr. Odermatt, is there a difference in the price of gasoline delivered, let us say at Wells, Nevada, than there would be of gasoline delivered at Contact, Nevada? A. That is correct.

Q. That there is a difference in price?

A. That is correct.

Q. Would you mind stating what that differential was at or about the time of this fire in 1947?

A. Two cents a gallon.

Q. At which point was the price the greater?

A. At Contact, Nevada.

Q. You operated from Wells, Nevada?

A. That is correct.

Q. What did you do with this differential in price, that is, the two cents?

A. At that particular time we collected the two cents personally.

Q. In other words, that differential in price, two cents a gallon, was collected by you?

(Testimony of E. J. Odermatt.)

A. That is correct.

Q. And not sent to Standard Oil?

A. That is correct.

Q. And of course that was all done with the approval and consent [24] of Standard Oil?

A. I am not in position to answer that.

Q. Well, in any event they never interposed any objection? A. That is correct.

Q. And for how long a period of time did you continue that?

A. We continued that practice until, I believe it was September, 1949, at which time we entered into a different agreement with the company and we now bill it as an FOB point and they reimburse me for the two cents.

Mr. Platt: I think that is all, your Honor.

(Jury admonished and recess taken at 11:50 a.m.)

Afternoon Session, February 8, 1950, 1:30 P.M.

Presence of the jury stipulated.

Mr. Platt: With the indulgence of the Court and counsel, your Honor, I would like to ask the witness one or two more questions.

The Court: Very well, Mr. Platt. Is there any objection to the introduction of the contract exhibit?

Mr. Daly: Yes, if the Court please, we will object to the offered exhibit upon the grounds that no proper foundation has been laid. There is no showing that the plaintiff in this action had any notice of the circumstances of the contract or the terms of

(Testimony of E. J. Odermatt.)

the contract, and therefore it is not [25] binding upon him.

The Court: Objection will be overruled and the exhibit will be admitted as Defendant Standard Oil's Exhibit A.

Mr. Daly: If the Court please, for the sake of the record, we will also move to strike the testimony given in relation to the exhibit.

The Court: Motion will be denied. Any further cross-examination?

(Mr. Odermatt resumes the witness stand on further examination by Mr. Platt.)

Q. Mr. Odermatt, before the recess I called your attention to the contract and agreement entered into between you and Standard Oil Company of California, particularly with respect to the second paragraph of that agreement, which has since been marked Defendant's Exhibit A. On further examination of this contract, I find another paragraph to which I desire to call your attention, for the benefit of both the Court and the jury, and that paragraph is the third paragraph from the bottom of page 2 of the agreement, and it reads as follows: "It is further understood and agreed that company reserve no right to exercise any control over any of distributor's employees and that all employees of distributor shall be entirely under the control and direction of distributor, who shall be responsible for their actions and commissions." As I understand it, this morning you [26] testified that your

(Testimony of E. J. Odermatt.)

employees were entirely under your control. They were hired by you, that they were paid by you, and that the Standard Oil exercised no control over them at all. Am I correct in what I said?

A. That's right.

Q. May I ask you further as to whether you regulated the hours of employment of your employees?

A. Yes, I did.

Q. And if they had vacations, who regulated and controlled them?

A. I regulated them.

Q. And these things were all your own responsibility?

A. That's correct.

Mr. Platt: I think that is all.

Mr. Halley: Your Honor, I assume at this time it would be our privilege to examine Mr. Odermatt on parts of direct examination?

The Court: Yes sir.

Mr. Halley: However, at this time we will waive it.

The Court: Any further questions?

Redirect Examination

By Mr. Daly:

Q. Who regulated your vacation, Mr. Odermatt?

A. I didn't have any, but if I had had one I would have regulated it myself.

Q. You spoke of this price differential, I believe it was called, delivery price at Contact and Wells, of two cents a gallon, [27] was that on gasoline?

(Testimony of E. J. Odermatt.)

A. That was on gasoline and kerosene and fuel oils.

Q. Now did you collect the full amount, we will say, from Mr. Herzinger there at Mineral Hot Springs, the amount that you collected from him, did that include your hauling charge?

A. That's right.

Q. And you paid your numerous amounts by check, as I understood you to say?

A. That's right.

Q. And those checks were forwarded to San Francisco, is that correct?

A. No, the checks were sent to Salt Lake for the gasoline part of it. For the hauling, those checks were made out to me.

Q. Weren't they frequently made out to the Standard Oil Company? A. For the product.

Q. There was a separation of the two?

A. That's right.

Q. There were a number of questions asked about the payment of various taxes by you or by the Standard Oil Company. I presume the Standard Oil Company paid the real estate taxes on the bulk plant, is that right? A. Yes.

Mr. Platt: Will you clarify that a little further?

Q. When you answered the question, Mr. Odermatt, what did you think was meant by the term "bulk" plant? [28]

A. Real estate property, warehouse, garage, storage tanks.

Q. Warehouse, garage and storage tanks?

A. Yes.

(Testimony of E. J. Odermatt.)

Q. And those, I understand, were owned by the Standard Oil Company? A. That's right.

Q. And the particular bulk plant to which we are both referring I take it also is at Wells?

A. That's right.

Q. The commissions which you received, Mr. Odermatt, were they by check from the company?

A. That's correct.

Q. Were those checks sent by mail?

A. Yes.

Q. How frequently, or when, were they received by you? A. Once each month.

Q. Do you remember, Mr. Odermatt, the deposit stamp you spoke of that was put on the checks before they were sent to Salt Lake City for deposit—was that furnished by the Standard Oil Company?

A. Standard Oil checks?

Q. The stamp, the deposit stamp?

A. Are you referring to Standard Oil checks?

Q. I am referring to checks payable to the Standard Oil. A. Yes.

Q. Plaintiff's Exhibit 3. The stamp I am referring to is the [29] first one that appears on the top at the back.

A. Yes, that was supplied by the Standard Oil.

Q. Is that the only stamp you put on the checks?

A. Yes, that was all on the Standard Oil checks.

That was the only endorsement we placed.

Q. Did you have any meetings of distributors throughout this area with representatives of Stand-

(Testimony of E. J. Odermatt.)

ard Oil Company along about May of 1947, or say for a year's period prior to that time?

A. In what connection?

Q. Well, in any connection. Was it a company policy to call the distributors together for meetings?

A. No, not as a wholesale distributor, I don't remember any meetings in that vicinity of time.

Q. Did your association with Standard Oil Company begin with this agreement in August of 1944?

A. No, it did not.

Q. What was your connection with them prior to that time?

A. I had worked prior to that time as an employee.

Q. Where?

A. I started in Reno, worked in Tahoe City, Quincy, Fresno, Wells, Susanville, Ely, Ruth, McGill, Carlin, and Wells.

Q. What were you doing for them?

A. Part of the time I was engaged as a tanker driver. The last few years I worked for them as an employee I was operating a plant, in charge of a bulk plant. [30]

Q. In charge of a bulk plant?

A. That's right.

Q. Is that different than the bulk plant you are talking about at Wells?

A. For the last few years it was the same plant. I worked from 1932, I believe, to '41 in that same plant.

Q. At Wells?

A. That's right.

(Testimony of E. J. Odermatt.)

Q. Well, from the time you entered into this contract with Standard Oil Company, which is dated August 26, 1944, did you have any visits from representatives of Standard Oil Company?

A. We had a branch manager that lives in the section that makes visits in the field, yes.

Q. Where is the branch manager that would contact you located? A. In Ely.

Q. Would he come to your bulk plant there, or the Standard Oil bulk plant at Wells and see you?

A. That's right.

Q. And did he discuss with you methods of your operations and the handling of petroleum products?

A. His visits were in line with sales promotion, collection of delinquent accounts that was their responsibility, which had lapsed their time.

Q. Did he keep in pretty close touch with you on those matters?

A. Well, I couldn't tell you exactly how frequent his visits [31] would be. They might be once a month, they might be oftener or over a greater period of time.

Q. Did any representatives of Standard Oil Company ever suggest to you ways of handling the petroleum products and the delivery of the products? A. No, sir, not as a distributor.

Q. You never had any suggestions from any place? A. No sir.

Q. I hand you, Mr. Odermatt, what has been marked Plaintiff's Exhibit 5 for identification, and ask you what it is?

(Testimony of E. J. Odermatt.)

A. It is Sales Operation Manual.

Q. Do you know who it is put out by?

A. By the Standard Oil Company.

Mr. Daly: At this time we offer the Sales Operating Manual in evidence.

Mr. Platt: May I ask a question or two, your Honor?

The Court: Yes sir.

Q. (By Mr. Platt): Mr. Odermatt, did you ever have a copy of this manual?

A. As an employee, yes. At the present time, to my recollection, I do not have one.

Q. How long has it been since you had a copy of this manual?

A. I would be at a loss to say. That one itself is dated 1938. I probably had one in my possession up to '41.

Q. Up to '41? [32] A. Very possible.

Q. As an employee of Standard Oil Company?

A. That is right.

Q. But since you became a distributor, you have never had one of these manuals?

A. Not to my recollection, no. I don't have one in my possession. We have a sub-station manual at our bulk plant which is a fairly large book, but what it contains in complete detail, I couldn't tell you from memory.

Q. Well, so far as the contents of this particular manual may be concerned, you have no knowledge? You don't know what it contains?

Mr. Parry: I object to that as not being in line with the testimony given by the witness.

(Testimony of E. J. Odermatt.)

The Court: That would be a matter for argument.

A. I would say as to the contents of the manual, it is something as an employee would have to definitely refer to.

Q. Do I understand because you are not an employee and because you are a distributor, it isn't of any particular interest to you?

Mr. Parry: I object to that as immaterial, if the Court please, whether of interest to him.

The Court: Maybe you could explain what you mean by interest.

Mr. Platt: Of course, the point I am trying to bring [33] before the Court is this, certainly this particular manual must have been called to the attention of the witness and that is what I am trying to establish, in order to ascertain whether he has any knowledge of its contents.

The Court: Be a little bit more specific on the question of whether it is of interest to him.

(Question read).

The Court: In what way do you mean, Mr. Platt, interest?

Mr. Platt: Let me withdraw the question and ask you this:

Q. Has this particular manual, or one like it, been called to your attention, or has it been sent to you while you were acting in the capacity of a distributor for the Standard Oil? A. No sir.

Q. You say no? A. No sir.

(Testimony of E. J. Odermatt.)

Mr. Platt: Well, your Honor please, we object because it seems quite evident the manual has never been called to the attention to the witness.

Mr. Halley: We join in the objection, your Honor.

The Court: I can't see where it would be material at this time. The objection will be sustained to its admission at this time, without prejudice, of course, to offer it later if it appears then [34] to be in order.

Mr. Daly: We would like to ask one or two more questions.

Q. (By Mr. Daly): I presume you had a manual the same as this in your possession, you say probably up until 1941? A. That is possible.

Q. You have read it, have you not?

A. That's right.

Q. You are familiar with what it is?

A. I couldn't tell you exactly what is in it after this length of time, no.

Q. I call your attention to what is printed there and ask you to whom this book is directed?

Mr. Halley: Before he answers the question, I would like to see the book, your Honor.

The Court: Yes.

Mr. Halley: We will object to the question, your Honor, for the reason that, first, no foundation has been laid or proved for the introduction of the manual itself, or any of its contents; secondly, it refers to matters—the printed matter that counsel

(Testimony of E. J. Odermatt.)

is referring to—refers to matters of which this witness has no knowledge, by his own testimony, by reason of the fact that he stated he did not have that manual as a distributor.

The Court: Objection will be sustained. [35]

Q. You spoke of a sub-station manual, Mr. Odermatt. Do you have one of those with you?

A. No, I don't.

Q. Is this what you are referring to when you say sub-station manual? A. No, it isn't.

Q. Do you have one of these?

A. No, I don't.

Q. Where is your sub-station manual, Mr. Odermatt? A. It is at my plant in Wells.

Q. Weren't you served with a subpoena to bring such a manual with you?

A. I was served with subpoena but on the very last minute and I was stopped on my way through Elko on the way to Reno. I believe that in all fairness to me that the subpoena should have been served before the departure time.

Q. Isn't it a fact that you were served with that subpoena on Monday? A. That is right.

Q. Is that the last minute?

A. I was in Elko on my way to Reno, yes sir.

Mr. Halley: May I ask a few questions, your Honor, at this time?

The Court: If counsel is finished.

Mr. Daly: No, I am not through. [36]

The Court: Do you object?

Mr. Daly: No.

(Testimony of E. J. Odermatt.)

Mr. Halley: The reason I ask this, your Honor, is to show that when Mr. Odermatt was on his way from Wells he had to go through the city of Elko to be here for the purpose of the trial and he was served with this subpoena at that late date when coming from there. I would like to also say that Mr. Odermatt is trying to arrange to get the type of manual they have asked for in their subpoena from one of the local distributors in this area and I think later we can produce it.

Mr. Daly: That was the only question I was going to ask Mr. Odermatt.

The Court: Any further questions?

Recross-Examination

By Mr. Platt:

Q. Mr. Odermatt, you testified, as I understand, to the best of your knowledge Standard Oil Company paid taxes on certain real property or real estate, is that what you said? A. That's right.

Q. Did you mean by that that Standard Oil paid taxes on all real estate it owned in the State of Nevada?

A. I meant it paid real estate taxes on the property at Wells, Nevada. That is the only thing I have any knowledge of.

Q. And that was real property, the title to which was in Standard Oil? [37]

A. Well, I couldn't tell you whether the title of that property—I believe it is railroad ground—they have property that they pay taxes on in Wells.

(Testimony of E. J. Odermatt.)

Q. May I ask you—of course, I assume counsel will admit that under the legal requirements of this State anybody is required to pay taxes on real property which he, or any corporation, may own within the State of Nevada. How do you know of your own knowledge that Standard Oil did pay taxes on real property it owned in the State of Nevada, or Wells or any other part of the State?

A. Well the tax book that is put out by the county assessor.

Q. And you got that information from reading the assessor's reports? A. That's right.

Q. And what you are testifying to, then, was payable alone and solely upon real property which Standard Oil owned in and about Wells?

A. That is right.

Redirect Examination

By Mr. Daly:

Q. This contract, Defendant's Exhibit A, was prepared by the Standard Oil and sent to you, is that not right? A. That's right.

Mr. Daly: Thank you, that is all.

Mr. Platt: No further question.

Mr. Halley: We have no further questions. [38]

MR. ROSS FRED MOSELY

being duly sworn, testified on behalf of the plaintiff as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name please?

A. Ross Fred Moseley.

Q. Where do you reside?

A. Contact, Mineral Springs, Nevada.

Q. How long have you resided there?

A. About four years.

Q. And what is your business or occupation there, Mr. Moseley? A. Bar tender, I guess.

Q. At what place? A. Mineral Springs.

Q. Is that the place also called Mineral Hot Springs? A. That's right.

Q. Who is the manager there?

A. Mr. Herzinger.

Q. Where does he reside? A. Buhl.

Q. And when he is not there, who manages the Hot Springs? A. Well, I do.

Q. How much of the time is he there?

A. Well, possibly once a week.

Q. The remainder of the time you are in charge? [39] A. That's right.

Q. Do you recall a period about or around the time of the fire there in May, 1947? A. I do.

Q. Were you there then? A. I was.

Q. What duties were you performing there at that time?

A. I was in charge of the place on that particular day.

(Testimony of Ross Fred Moseley.)

Q. Where is this Mineral Hot Springs located, say with reference to Contact?

A. Well, it is about a mile and a half north.

Q. And on what highway? A. 93.

Q. How are the buildings which are located there situated with reference to the highway?

A. You mean how are they set?

Q. Yes, are they close to the highway or where are they located?

A. They are just off the highway.

Q. Are there some hot springs there?

A. Yes.

Q. How far are the hot springs from the highway? A. Oh, about 300 yards.

Q. Are there some buildings near the hot springs? A. Yes sir. [40]

Q. What buildings are there?

A. Cabins, bath house.

Q. How many cabins in that area?

A. Five cabins.

Q. And also a bath house? A. Five baths.

Q. Were there some more cabins over closer to the highway? A. Yes.

Q. And in May, 1947, how long had you been there, about?

A. Well, a year and a half, I judge.

Q. And during that period of time from who had you procured your gasoline and other petroleum products sold there? A. Mr. Odermatt.

Q. What kind of products were they, what brand?

(Testimony of Ross Fred Moseley.)

A. Gasoline, fuel oil, stove oil.

Q. And made by what company, if you know?

A. Standard Oil.

Q. Was there a service station there?

A. Yes sir.

Q. And some pumps? A. Yes sir.

Q. How many pumps did you have?

A. Two.

Q. Where did you store the gasoline and dispense through the pumps? [41]

A. They were stored in underground tanks.

Q. How many underground tanks were there?

A. Two.

Q. Generally what did the building consist of that was there by the highway. Describe it to me generally first.

Q. Well, it was a frame structure.

Q. Just tell me what rooms were there.

A. Well, had a bar room, grocery store, and a cabin and oil house and pump house and power.

Q. And where was the service station? Was it connected with this building you described?

A. It was right in front of the grocery.

Q. Have you prepared a sketch map which indicates generally the station there and the buildings that were there, Mr. Moseley? A. Yes.

Q. I hand you a plat and will ask you if you know who prepared that? A. I did.

Q. And does it show generally the building as it existed there the day of the fire, the floor plan?

Mr. Platt: If I may be permitted to interrupt?

(Testimony of Ross Fred Moseley.)

The Court: Yes.

Mr. Platt: I suppose the purpose of that plat is to acquaint the jury with the construction of the building and I [42] don't know how that can get to your Honor and the jury unless somebody makes a diagram on the blackboard to make it clear to everybody.

Mr. Parry: I was going to offer this diagram first, Mr. Platt, to see if it would not clear it up.

Mr. Platt: We would have no objection to the witness going to the blackboard.

The Court: If this is a fair representation of the construction there, I can not see where it would be objectionable and then if you want any further illustration, some one can place it on the board.

Q. (By Mr. Parry): Approximately what scale did you use, Mr. Moseley, in making it?

A. Three inches to a foot.

Q. As far as you know, does that represent the relative size of the rooms and their location there?

A. Yes.

Mr. Parry: Now I will show it to counsel and see what they think about it.

Mr. Puccinelli: May we have the Court's indulgence?

The Court: Certainly.

Mr. Parry: At this time then, for the purpose of illustration, we will offer in evidence Plaintiff's Exhibit No. 6, with the idea of going ahead. [43]

Mr. Platt: We have no objection to that, your

(Testimony of Ross Fred Moseley.)

Honor, if it will not be deemed an admission on our part that it is accurate.

The Court: Of course, you will not be precluded from showing later on any inaccuracy, if there is any. It may be admitted in evidence.

Q. Mr. Moseley, I wonder if you will take this map that we have marked Exhibit 6, and I will give you a pencil and will you first mark on there which room was the one that you call the bar room?

A. This lower one.

Q. Will you write that in your handwriting some place in there? (Witness complies.) Now what are the directions on the map as you hold it?

A. Well, this is facing west, this is north, this is east, and this is south.

Q. And talking among associate counsel, it is suggested, as they recall it, the scale was one-eighth of an inch to a foot. Does that coincide with your memory? A. Well, that is more like it.

Q. And toward the top of the map, as I am now holding it, I notice the word "canopy," is that the service station part of the building?

A. That is the canopy in front of the roof.

Q. Is that so cars could drive in? [44]

A. Yes.

Q. Those two red circles near the top are what?

A. They represent pumps.

Q. As the plat now stands, it doesn't show any doors and windows? A. No.

(Exhibit passed to the jury.)

(Testimony of Ross Fred Moseley.)

Mr. Parry: The suggestion has been made, your Honor, we might save time if we take a short recess and have the witness transfer this to the blackboard.

The Court: Couldn't we proceed with some other witness while he is drawing that?

Mr. Parr: I think probably we will have to assist him somewhat in doing it, so it will be a little difficult to proceed.

The Court: We will take a recess for about ten minutes. Jury admonished and recess taken at 2:10 p. m.

2:30 P. M.

Presence of the jury stipulated.

Mr. Moseley resumes the witness stand on further

Direct Examination

By Mr. Parry:

Q. Mr. Moseley, when gasoline was delivered to the place there at Mineral Hot Springs, where did they haul it from?

A. From Wells, Nevada. [45] ?

Q. Were there any hills in between Wells and Mineral Hot Springs, or grades?

A. Yes, there are several.

Q. And this day, May 3, 1947, what kind of a day was that? A. Pretty warm.

Q. How warm was it, if you know?

A. Well, I judge about 90 in the shade.

Q. And do you recall Mr. Nielson arriving there with a load of gasoline? A. I do.

(Testimony of Ross Fred Moseley.)

Q. What was their usual custom when they brought gasoline for delivery? What did they do when they got there?

Mr. Platt: I object to the custom. If the witness has knowledge of what Mr. Nielson did when he delivered the gasoline, that is competent testimony.

The Court: Can you lay a little better foundation?

Mr. Parry: Yes.

Q. Do you know how Mr. Nielson delivered gasoline when he came there each time?

A. How he delivered it?

Q. Yes, answer yes or no. Do you know what procedure he followed? A. No.

Q. Did you watch him this particular day?

A. No. [46]

Q. Then will you step down to the map that you prepared on the blackboard, please, Mr. Moseley. Starting with the diagram closest to yourself, what is the room that you have drawn first on the blackboard, Mr. Moseley?

A. This is called the bar room.

Q. Have you put some figures on there, numbers?

A. Yes sir.

Q. What do they indicate?

A. That is the dimensions of the building.

Q. Are those the inside or outside dimensions, if you know? A. The outside.

Q. And what was the size of that room we call the bar room? What are the dimensions?

A. Twenty-four by sixty.

(Testimony of Ross Fred Moseley.)

Q. And then what is the direction closest to yourself, what direction is that? A. That is south.

Q. And then as you go north, what is the next room there? A. That is the grocery store.

Q. What was the size of the grocery store?

A. Sixteen by twenty-four.

Q. And then is there a room east of the grocery store? A. That is a back porch.

Q. What was the size of it?

A. Eight by twenty-four. [47]

Q. Was there a door between the bar and the grocery store? A. Yes.

Q. Have you shown that on your map?

A. No, I have not.

Q. I wonder if you would take an eraser and chalk and fix that store and show where the bar was. Is that line supposed to be solid from there on down below the door? A. Yes.

Q. Let us draw that a little heavier so we can see it. Above the door is that line solid to up to the front wall? A. That's right.

Q. There is one door then from the bar room into the grocery room? A. Yes sir.

Q. About how wide was that door?

A. About 2.8 by 6.8.

Q. What do you mean by that?

A. That is the size of the door.

Q. Two feet eight inches by six feet eight inches, is that right?

A. Two-eight wide, six-eight long.

Q. Now was there a front door in the bar room?

(Testimony of Ross Fred Moseley.)

A. Yes.

Q. I wonder if you would show us where that was please. (Witness indicates.) Now were there some windows in the front [48] of the bar?

A. Two.

Q. By a couple of "x's," would you show us on each side where the windows were? How wide were those windows? Show us how wide they were by an "x" on each side. (Witness complies.)

A. They would be approximately four by eight, four feet wide and eight feet high.

Q. Now there was a door from the grocery store out into the front? A. Yes, sir.

Q. Will you show us where that was? (Witness indicates.) Were there windows in the front of the grocery store? A. Yes, there were two.

Q. Show those with "x's," one on each side, please. How large are those windows?

A. Well, they are about the same size as the bar room windows.

Q. Have you shown the gasoline pumps on your map? A. Yes sir.

Q. How have you shown those?

A. Right here.

Q. By two circles near the top. Now what extended from the grocery store front wall out to the pumps?

A. A canopy in front of the grocery store. [49]

Q. What held the canopy up out towards the pumps?

(Testimony of Ross Fred Moseley.)

A. Those two upright pipes, one here and one here.

Q. That is the corner?

A. That is each corner.

Q. That is the gasoline station canopy so cars could drive in under? A. That is right.

Q. What did the pumps set on?

A. Concrete base.

Q. A concrete island there for the pumps?

A. Yes.

Q. Going back to the bar room, were there any windows on the side wall of the bar room?

A. No.

Q. This day in question was the front door of the bar room open? A. It was.

Q. Was the front door of the grocery store open?

A. Yes.

Q. Was the door between the bar room and the grocery open? A. Yes.

Q. Immediately north of the bar room you have another building there marked. What is that building? A. That is a cabin.

Q. What is the size of it? [50]

A. Twelve by twelve.

Q. Was there any one in that that day, that you know? A. Yes.

Q. Who was in there?

A. There was one night man in there.

Q. Do you know his name? A. Yes.

Q. What is his name?

A. His name was Jim, I believe.

(Testimony of Ross Fred Moseley.)

Q. And was there some space between the grocery store and the cabin? A. Yes.

Q. About how much?

A. About a foot between the grocery store and the cabin.

Q. And then the next building to the north was what? A. That was the oil house.

Q. Was there a space between those two buildings? A. About the same distance.

Q. On there north what is the building you have over there? A. A pump house.

Q. What kind of pump did you have in there?

A. Pressure.

Q. To pump water? A. Yes.

Q. Did you have a water system? [51]

A. Yes.

Q. Were there some cabins around that area that you have not shown on the blackboard?

A. There were two cabins sitting back here just beyond the grocery store.

Q. What are the dimensions of the cabins there, the one up by the grocery store? A. This one?

Q. Yes. A. Twelve by twelve.

Q. And what were the dimensions of the oil house? A. Fourteen by twenty-four.

Q. And the pump house? A. Ten by ten.

Q. How many places were there to fill underground tanks? A. Two.

Q. Can you indicate where those two places were, where they filled the underground tanks? Mark a small circle on your plat. (Witness complies.) One

(Testimony of Ross Fred Moseley.)

of them is on the west wall of the grocery store and north of the door and in front of the window, is that correct? A. Yes.

Q. And the other is between the two gasoline tanks? A. Yes.

Q. When Mr. Nielson came to your place there the day of the [52] fire, where were you?

A. I was inside the bar room.

Q. Who, if any one, was in there with you?

A. Mr. Klitz and Mr. Nielson and myself.

Q. Now when Mr. Nielson drove up, what time of day did he arrive?

A. Oh, about one o'clock.

Q. And where did he drive first when he came up? A. He drove to this tank here.

Q. This one closest to the grocery store?

A. That's right.

Mr. Platt: May I inquire if the witness saw Mr. Nielson drive up?

The Court: Yes sir.

Q. (By Mr. Platt): Did you see Mr. Nielson drive up?

A. I wouldn't say that I saw him drive up. My first recollection when he drove up he was filling the tank.

Mr. Daly: Is that the tank there under the canopy? A. Yes.

Mr. Platt: You Honor, of course we would not interpose any objection to testimony that the witness has based upon his direct knowledge, but I understand him to say that he did not see Mr. Niel-

(Testimony of Ross Fred Moseley.)

son drive up. If he saw him, that is another thing, I think his testimony would be competent, but if he didn't see him, then his testimony is guess work. [53]

Mr. Parry: Possibly I can ask a question to clear it up.

Mr. Halley: For the purpose of the record, your Honor, may the witness' answers concerning Mr. Nielson driving up to the place he has indicated be stricken for the time being? If he hasn't knowledge of the fact Mr. Nielson drove up——

The Court: We will let that stand.

Q. (By Mr Parry): Where did you first see Mr. Nielson's truck?

A. In front of the building, in front of the grocery store.

Q. What was he doing there at the truck when you first saw him?

A. Apparently delivering gas.

Q. Did he come in and ask you any questions first? A. No.

Q. Was that his custom, just to come in and start emptying gas into the tanks?

A. That was his custom.

Q. For how long had he followed that custom, if you know?

A. All the time he was on the route while I was there.

Q. Then did he start delivering gas into the filler pipe there at the west wall of the grocery store?

A. That was where he first put it.

(Testimony of Ross Fred Moseley.)

Q. While he was delivering that gas, what did Mr. Nielson do? A. He was in the building.

Q. What part of the building? [54]

A. The bar room.

Q. Did you talk with him any? A. Yes.

Q. Do you remember what your conversation was?

Mr. Puccinelli: Objected to as not responsive. He can answer yes or no.

The Court: He evidently would answer yes. He might as well go ahead.

Q. Proceed. What did you do there with Mr. Nielson?

A. We didn't have any conversation outside I sold him a drink, a soft drink.

Q. Did he drink the soft drink there?

A. Well, I presume.

Mr. Halley: May I suggest if the witness does not know he say so, rather than presume. He has used the phrase twice.

The Court: I think the best thing to do is to let the witness testify and then you can clear up any questions on cross-examination.

Q. Then what did Mr. Neilson do next?

A. He was still in the building.

Q. And about how long did he stay in the building there that first time?

A. Well, I wouldn't say exact because I don't know.

Q. Can you give us any estimate? [55]

A. I would say maybe 15 or 20 minutes.

(Testimony of Ross Fred Moseley.)

Q. Then what did he do?

A. We went outside and moved his truck over to the other tank.

Q. And where did he move his truck then that next time? A. What is the question?

Q. Where did he move his truck to?

A. He moved it over to the other tank.

Q. I wonder if you would come down to the blackboard and take that blue chalk and show us where he moved his truck to.

A. Then he pulled his truck down to this point.

Q. Draw his truck in there, just roughly. (Witness complies.) Tell us which way it was headed. That is west of the pump, is that right?

A. It was on the west side of the pumps.

Q. Then what did he do after he moved his truck over there? A. Came back to the building.

Q. Had he started to deliver gas?

A. I presume.

Mr. Halley: Just a second. I move that go out.

The Court: Maybe we ought to find out whether he knows or not.

Q. Did you look outside there?

A. Yes, I looked out.

Q. Did you see the truck?

A. The truck was out there. [56]

Mr. Platt: Your Honor, I must interpose an objection to these leading questions.

The Court: Well, I think under the circumstances we may be wanting one or two of them. Objection will be overruled.

(Testimony of Ross Fred Moseley.)

Q. What did you see happening out there at the truck?
A. Nothing.

Q. What do you mean by nothing?

A. There was nobody around the truck.

Q. Where was Mr. Nielson?

A. In the bar room.

Q. Did you see the hose leading from the truck anywhere?

A. Not at that particular moment.

Q. Well, at any time did you?

A. No, I didn't.

Q. Then after Mr. Nielson moved the truck, did he go back into the bar room again?
A. Yes.

Q. How soon after he moved the truck?

A. Well, about a minute after.

Q. Right immediately afterwards?

A. Yes sir.

Q. And then what did he do when he came in the bar room?
A. Well, amused himself.

Q. How? [57]

A. Well, there was a picture machine in the rear end of the building.

Q. What kind of a picture machine was it?

A. A moving picture.

Q. How does it operate?

A. Well, it is run by electricity, moving machine.

Q. What did it take to start it operating? What made it go?

A. You had to put some coins in to get it in operation.

(Testimony of Ross Fred Moseley.)

Q. Did Mr. Nielson put any coins in it?

A. Yes.

Q. Do you know how many?

A. No, I don't.

Q. Would you step down again and show the jury where the moving machine was? Draw a small square there.

A. Right here.

Q. Now where was Mr. Nielson while he was looking at the pictures?

A. Well, right in about the center of the building, sitting on a stool.

Q. About how far back from the machine?

A. Well, thirty-five feet.

Q. How many feet? A. Thirty-five feet.

Q. Now draw a circle with an "x" there where he was. Now was Mr. Klitz around there some place? [58]

A. He was in the building.

Q. Where was he from the moving machine?

A. He was right here at the machine.

Q. Draw an "x" and circle where Mr. Klitz was.

(Witness complies.) Now were there any counters or bars in that room?

A. Yes, there was counters along this.

Q. Take some white chalk and draw where they were. (Witness complies.)

A. This is the bar.

Q. Put a "B" there.

A. This is the lunch counter.

Q. Put an "L" there. Now where were you standing just before this fire?

A. Well, I was right here.

(Testimony of Ross Fred Moseley.)

Q. Take this blue chalk and put an "x" and circle the "x" where you were. Were you in the building or outside the building?

A. I was in the building. I wasn't long getting out. It didn't take me long to get out.

Q. At that time were there any open flames of any kind in the bar room, stoves or anything of that sort?

A. Nothing in operation.

Q. Anything in operation at the grocery store?

A. No.

Q. Where were you standing when you first saw this fire? [59]

A. Right here.

Q. Could you see outside?

A. Yes.

Q. And through what could you see outside?

A. Through these windows.

Q. That would be the most southerly window on the west wall of the grocery store?

A. That's right.

Q. What did you see? Tell the jury exactly what you saw there.

A. I saw the truck.

Q. When the fire started, what did you see?

A. Saw the fire.

Q. Where did you see the fire?

A. Right under the truck.

Q. Take the pointer there where you saw the flash of fire.

A. Well, it would be right in there, the rear part of the truck.

Q. That is near the most southerly pump?

A. Near this pump.

Q. How much of a flash of fire did you see?

(Testimony of Ross Fred Moseley.)

A. Well, it extended.

Q. An extension? A. That's right.

Q. Of what extension with reference to the canopy there?

A. The truck was outside the canopy, direct to the corner of the building. [60]

Q. Where did the flash, the flame, go that it came from? A. Up under the canopy.

Q. How much flame and fire was there there?

A. How much flame and fire?

Q. Yes. A. All flame and fire.

Q. What did you do when you saw that flash out there?

A. I got out of there as quick as I could.

Q. How did you go out?

A. Out the front door.

Q. That is the door you have drawn on the diagram? A. That's right.

Q. What did Mr. Nielson do.

A. He went out too.

Q. What door did he go out?

A. The same one I did.

Q. Which one of you went out first?

A. That was about a tie.

Q. Was there any flame in the doorway when you went out? A. Yes, it was coming in.

Q. Was there any flame inside the building when you went out? A. No.

Q. Where was the flame, inside or outside.

A. It was outside.

(Testimony of Ross Fred Moseley.)

Q. Did you get burned as you went through the door? [61] A. No.

Q. What kind of clothes did you have on?

A. Didn't have many on.

Q. Did you have a coat on? A. No.

Q. Did you have a shirt on? A. No.

Q. Did you have your sleeves rolled up?

A. No.

Q. Were you wearing the same beard and whiskers you are wearing now? A. Yes.

Q. Did you get your eyebrows or beard singed in going out of the door? A. No.

Q. What direction was the wind blowing, if you know? A. Coming southwest.

Q. Coming from the southwest?

A. That's right.

Q. What did you do when you got outside there?

A. Oh, nothing I could do.

Q. Did you see Mr. Klitz go out? A. No.

Q. Was there any one else in the barroom there?

A. Yes, I believe there was another fellow in there. [62]

A. And did you see him come out? A. No.

Q. What did Mr. Nielson do after he got out? What did you see him do first?

A. Well, he got in that truck as soon as he could.

Q. How soon did he get in it?

A. Just a matter of seconds.

Q. Did he go to the side or back of the truck before he got in?

(Testimony of Ross Fred Moseley.)

A. Well, it appeared to me he went to the rear of the truck.

Q. Went where?

A. To the rear end before he went to the cab?

Q. What did he do at the rear end, do you know?

A. Well, I wouldn't know.

Q. Did you see him make any motions?

A. He was making some pretty fast.

Q. Did he make any motions with his hands?

A. Yes.

Q. Can you show the jury how he did or how he moved his hands back there?

A. Just like anybody fighting fire, holding something hot.

Q. Did he try to fight the fire there at the back of the truck? A. Not apparently.

Q. What did he do?

A. It appeared to me he was taking the hose off the truck. [63]

Q. Then what did he do after that?

A. Went in the cab and got the truck out of the way.

Q. How soon did the truck start after he got in the cab? A. Right now.

Q. Which direction did he drive?

A. North.

Q. That would be toward the right-hand side of that road as you look at it? A. Yes.

Q. Did you see the truck drive away.

A. I did.

Q. Was there any fire around the truck?

(Testimony of Ross Fred Moseley.)

A. It was all afire.

Q. And did it leave anything behind it as it drove away? A. Rubber tracks.

Q. Did any fire spill out of the truck when it drove away? A. The truck was all afire.

Q. Was there any gasoline spilling out of the truck? A. No sir.

Q. Was there anything burning spilling out?

A. No. The truck was burning.

Q. The whole thing was burning?

A. The truck was afire.

Q. Any fire dragging on the ground as it drove along?

A. Burning. You couldn't tell with the wind blowing. [64]

Q. The wind was blowing pretty hard there?

A. Yes.

Mr. Halley: I move that go out. The witness is guessing and speculating apparently. It is not responsive to the question if he doesn't know.

The Court: I think the answer will stand. You can bring it out on cross-examination.

Q. Were the tires on fire, do you know?

A. I couldn't say as to that.

Q. Now then while he was driving the truck away, what did you do then?

A. I just got back there where I wouldn't get burned up and watched it burn.

Q. Did it burn very rapidly or slowly?

A. It burned very rapidly.

Q. Were you able to get anything out of the building? A. Not a thing.

(Testimony of Ross Fred Moseley.)

Q. Was there any money there in the building?

A. Yes.

Q. How much money was in there in different places, in different departments, if you know?

A. You mean the total amount?

Q. Well, let us take that step by step. Tell me one place where you had some money first.

A. Well, had two registers in the bar room. [65]

Q. Approximately how much money was in there, if you know?

A. About three hundred dollars in the bar register, about seventy-five in the grocery register.

Q. Did you have any money any other place?

A. Yes, we had cash box that we call drop-in money.

Q. What part of the room was it in?

A. That was under the counter, under the lunch counter.

Q. And how much was there?

A. About eight hundred dollars.

Q. Where else did you have any money there?

A. We had a box called the slot box.

Q. Where was that?

A. It was under the lunch counter.

Q. How much was in it?

A. Well, approximately a thousand dollars.

Q. Was this cash either silver or currency you were telling me about?

A. It was silver and currency.

Q. Were you able to get in and get any of the money out? A. No.

(Testimony of Ross Fred Moseley.)

Q. Did you have any checks in there in addition to that? A. Yes, we had some checks.

Q. What kind of checks were they, do you know?

A. Well, they were personal checks and some company checks.

Q. What company? [66]

A. Checks on the U. C. Land and Cattle Company.

Q. Did the U. C. Land and Cattle Company have their headquarters nearby?

A. About eight miles.

Q. What do you call the place where they had their headquarters?

A. Well, they call that San Juan.

Q. Did their men come over to your place much?

A. Quite frequently.

Q. Did they cash check over there?

A. Yes.

Q. What other kind of checks did you have on hand, if you know?

A. Oh, had some government checks.

Q. And do you know the amount of the checks that you had there? A. Oh just approximately.

Q. How much?

A. Approximately a thousand dollars in checks.

Q. Did you have any list of those checks after the fire?

A. Not after the fire. We did have before.

Q. Did you make any attempt to go in the building at all after you got out? A. No.

Q. Could you get back in?

(Testimony of Ross Fred Moseley.)

A. I could have got back in but I couldn't have got out. [67]

Q. How soon was it a mass of flames, within what time after you saw the first fire?

A. What time of day?

Q. No, how many minutes or seconds was it all on fire?

A. Oh, it was really more seconds than minutes. It was right now.

Q. Was there any flame inside the building at all when you went out the front door?

A. No, not when I went out.

Q. Did you have a car parked around there?

A. Yes.

Q. Where was your car parked?

A. South of the building.

Q. South of which part of the building?

A. You might say on the highway. That is right, I say, about southwest of the bar room.

Q. Step down and just make a couple of "x's" where your car was placed. About how close in feet was it to the building?

A. Well, about three hundred feet possibly.

Q. And what did you do with your car?

A. The building and roof fell in before I started to move it.

Q. Then what did you do?

A. Got in and moved it.

Q. Did your car get hot or catch on fire any?

A. No. [68]

(Testimony of Ross Fred Moseley.)

Q. Did you have occasion to observe which way the wind was blowing the fire and flame?

A. Coming southwest.

Q. Was there much of a wind blowing?

A. Pretty stiff wind.

Q. Then as to the buildings that you have shown on the blackboard, how many of them were consumed by the fire? A. All of them.

Q. Does that include the pump house? Was it burned also? A. Included the pump house.

Q. That would be the bar and grocery and canopy and cabin and oil house and pump house were all consumed? A. That is right.

Q. Were the cabins down to the east there burned? A. No.

Q. After the fire, after Mr. Nielson drove his truck from the road, how long did it continue to burn down there, do you know?

A. They worked there quite a while before they got it out.

Q. Who worked on it, do you know?

A. Well, several of the boys from the company ranch. I think Mr. Zilliox was one of them.

Q. Did Mr. Nielson get burned any there?

A. Apparently, yes.

Q. What did they do with Mr. Nielson? [69]

A. Well, he was taken down to Mr. Ray King's station and they gave him first aid there.

Q. Did you go down with him? A. No, sir.

Q. You stayed there at the place? A. Yes.

(Testimony of Ross Fred Moseley.)

Q. After the fire was over, did you see any remnants of the gasoline hose around there?

A. Yes, sir.

Q. Where did you see the gasoline hose after the fire? A. Well, the hose was destroyed.

Q. What did you see?

A. Well, the wire inside of the hose was laying right alongside the concrete base where the pumps are and the nozzle of the hose was still in the receiving tank.

Q. By receiving tank you mean that filler pipe that goes down to the underground tank?

A. That's right.

Q. Where did you say the nozzle was?

A. In this receiving tank.

Q. Where was the wire that had been in the hose?

A. Laying just like the rubber portion of it had stretched out, the wire and the nozzle.

Q. Was the wire right close to the nozzle?

A. Still connected with it. [70]

Q. Now then, while Mr. Nielson had his truck out there in front, were there any customers either at the service station or in the grocery store?

A. No one.

Q. How long had it been since a customer had been in there before the fire?

A. Well, about 11:30.

Q. Had anybody been there after that time?

A. No.

Q. And over in the grocery store was there any

(Testimony of Ross Fred Moseley.)

fire or flames or anything burning over there before the fire? A. No.

Q. Was there a refrigerator there in the grocery store? A. Yes, sir.

Q. What kind of refrigerator was it?

A. It was an oil refrigerator.

Q. Was it operating?

A. No, it was not operating.

Q. How long had it been since it had operated?

A. Probably five months.

Q. Where had it been when you were using it when it had been operating?

A. We had it in the bar room.

Q. Why did you move it out?

A. Well, we bought a new electric refrigerator for the bar [71] room.

Q. Then where did you put this oil refrigerator?

A. In the grocery store.

Q. Did you operate it any after it was in the grocery store? A. No.

Q. Was there any sign of any kind on it?

A. "For Sale" sign on it.

Q. In taking the whole area of buildings there, was there any open flame or anything of that sort around there?

A. No, there was no open flame.

Q. Was anything burning that would create a spark. that you know of? A. No.

Q. Did you have a stock of groceries in the store? A. Yes, sir.

(Testimony of Ross Fred Moseley.)

Q. Was the bar and all those rooms, were they all equipped? A. Yes.

Q. That is with the usual furniture and appliances? A. Yes.

Mr. Parry: With the possible exception, your Honor, that we may have to recall Mr. Moseley on some of the items of damages, that is all of him at this time. You may examine him.

Cross-Examination

By Mr. Platt:

Q. Mr. Moseley, are you acquainted with the branch manager of the Standard Oil Company, Mr. William Warner? [72] A. Yes, sir.

Q. And you know he resides in Ely, Nevada?

A. Yes, sir.

Q. You have seen him occasionally, have you, at the place at which you work, Mr. Herzinger's place? A. Yes.

Q. Do you recall having a conversation with him on the 4th day of May, 1947, the day following the fire? A. Yes, he was there at the place.

Q. And do you remember where that conversation took place?

Q. Well, as I recall, I was down in the little cabin below.

Q. And do you recall whether there was any one else present during that conversation?

A. Yes, sir, there was another party with him, but I couldn't recall now what his name was.

(Testimony of Ross Fred Moseley.)

Q. Do you remember whether Mr. Odermatt was present or not?

A. Not at that particular time.

Q. Do you remember any other conversation with Mr. Warner at which Mr. Odermatt was present? I mean a conversation following the fire?

A. You mean that Mr. Warner and I had?

Q. Yes.

A. In Mr. Odermatt's presence?

Q. Yes. A. I never had one. [73]

Q. That is, you do not recall a conversation at which Mr. Odermatt was present, is that it?

A. Well, it all depends—

Q. I mean a conversation following the fire, following May 3, 1947, or after the fire?

Mr. Parry: I think the question has been asked and answered. He said he never had one.

The Court: Let him answer.

A. I don't recall having a conversation with Mr. Odermatt in Mr. Warner's presence before the 3rd.

Q. I want to be fair with you. Is it possible that you did have a conversation with Mr. Warner in the presence of Mr. Odermatt and you just don't recall it?

A. Well, that would be later than the 4th day of May in 1947.

Q. Well, all right—but you do recall a conversation with Mr. Warner on the day following the fire? A. Yes.

Q. Which was May 4, 1947? A. Yes.

(Testimony of Ross Fred Moseley.)

Q. Do you remember at that conversation whether there was another man present by the name of Mr. Hack?

A. Well, there was a man by that name on the premises about that time.

Q. What, if anything, did he do on the premises?

A. Well, nothing in particular. He just had a cabin there and [74] that was his home.

Q. Is it fair to say that he frequented the premises on many occasions because he lived in the neighborhood? A. That's right.

Q. Isn't it a fact, Mr. Moseley, that Mr. Warner, branch manager of Standard Oil, discussed with you as to the cause of the fire?

A. That is not; we never discussed it.

Q. You never discussed it? A. No.

Q. When he came to see you after the fire, the day following, what did you and he talk about?

A. Well, I don't recall—just about bock beer part of the time.

Q. How far is Ely from Contact?

A. Two hundred ninety-three miles.

Q. And Mr. Warner wasn't a daily visitor, was he, at the Herzinger place? A. No.

Q. I understand from your testimony that Mr. Warner came to your place from Ely, or Mr. Herzinger's place, of which you were manager, and all you talked about the day following the fire was about bock beer?

A. That is one thing I remember.

Q. You don't remember anything else? [75]

(Testimony of Ross Fred Moseley.)

A. We didn't discuss the fire.

Q. Are you positive that Mr. Warner never mentioned the fire? A. Yes, he did.

Q. He did?

A. He wanted to know how it got started.

Q. I thought you just said a minute ago that you didn't discuss it at all.

A. I didn't; he was discussing it.

Q. In this discussion, did he talk to you and did you talk to him? A. Yes, I talked to him.

Q. Now, isn't it a fact, Mr. Moseley, that you confirmed a statement made to Mr. Warner by Mr. Hack in which it was said that a gasoline icebox was full of meat in the store and the box was in operation? A. I confirmed that statement?

Q. You confirmed that statement. A. No.

Q. Isn't it a further fact, Mr. Moseley, that upon that occasion you confirmed the statement made by Mr. Hack to Mr. Warner that he first noticed the first roar of flames in the store at the time of the explosion? A. No.

Q. Then as he ran out of the bar room he saw the flames also were all around the station canopy and up high in the canopy [76] ceiling—wasn't that statement confirmed by you? A. No.

Q. You deny that you said to Mr. Warner, in confirmation of Mr. Hack's statement, that the kerosene icebox was full of meat in the store and the box was in operation?

A. I told Mr. Warner that the refrigerator had cured meat in it.

(Testimony of Ross Fred Moseley.)

Q. Oh, you told Mr. Warner that the refrigerator had some meat in it? A. Cured meat.

Q. As a matter of fact, Mr. Moseley, wasn't the box in operation and wasn't there a pilot light burning? A. No, sir.

Q. At the time of the fire? A. No, sir.

Mr. Platt: If your Honor please, I have interrogated the witness along the line for the purpose of laying the foundation for an impeachment. That is all for me at present.

The Court: Any further questions of this witness?

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Moseley, I believe you testified that you had been at Mineral Hot Springs for about four years, is that correct? A. That is right.

Q. Do you recall the date that you went to the Mineral Hot Springs to remain there permanently?

A. You mean permanently?

Q. Yes. A. Well, December of '46.

Q. Approximately six months prior to the date of the fire, is that correct, six or seven months?

A. Well, approximately.

Q. Now I believe you stated further, Mr. Moseley, that your general work or your occupation was that of a bar tender and general manager in the absence of Mr. Herzinger, that is correct, too, isn't it? A. Yes.

Q. And during Mr. Herzinger's absence you had

(Testimony of Ross Fred Moseley.)

absolute charge of the premises? A. Yes, sir.

Q. Now other than yourself, Mr. Moseley, who was employed at Mineral Hot Springs?

A. Beg pardon?

Q. Who worked there beside yourself?

A. Well, at that time there were only two of us, Mr. Traverto and myself.

Q. Where did he live? A. His home?

Q. No, where was he staying at the Hot Springs? Where did he sleep? A. He had a cabin. [78]

Q. Which cabin?

A. This cabin right about here.

Q. This cabin here, is that correct?

A. That is correct.

The Court: Describe it so it will be shown in the record, please, Mr. Puccinelli. You refer to it as "this."

Mr. Puccinelli: Designated as cabin 3, building or structure north, dimensions 12x12.

Q. Now, Mr. Moseley, I wonder if you would step down and on this cabin designated with numbers 12x12 fix any windows or any doors that were in existence on the day of the fire.

A. Well, here is a door, a small window here and a small window in the rear.

Q. Now what work did Mr. Traverto do?

A. He was night man, day man then.

Q. Did he also run your 21 game?

A. Well, he had some at different times. He wasn't a regular dealer.

Q. Who was the regular dealer?

(Testimony of Ross Fred Moseley.)

A. Well, a fellow by the name of Miller and Bartang.

Q. Were they there that day? A. No.

Q. Now for the sake of the jury and the Court, I want you to describe generally the contour of the ground which is to the [79] rear of these buildings.

A. Well, it was on a slope, sloping.

Q. Was it quite a steep slope?

A. Well, about, I would figure about a 40 per cent grade.

Q. Yes, as a matter of fact, from the rear of these buildings going east, there is quite a severe drop, is there not? A. That's right.

Q. Now for the sake of the record, I wonder if you would relate to us where the merchandise that was being stored in and about the premises was actually kept? By that I mean, do you have a basement and store room and if so, where were they located?

A. Well, there was a full basement under the bar room.

Q. How could you enter that?

A. From the rear.

Q. From the outside or inside?

A. Outside.

Q. Could you enter it from the inside?

A. No.

Q. Now I believe you testified, Mr. Moseley, that when you left those premises that you did not go back into the building because you were afraid you couldn't get out, is that correct?

(Testimony of Ross Fred Moseley.)

A. Correct.

Q. Did you go to the basement where merchandise might be stored in the basement? [80]

A. I attempted to.

Q. Did you salvage any of it?

A. Absolutely not.

Q. How long after did you attempt to do it?

A. I would say ten minutes.

Q. This building was 60 feet in length, is that correct? A. Correct.

Q. The fire, you say, started approximately at the point designated, by the corner of the canopy, which is 16 by 16, is that correct? A. Yes.

Q. Do you want this Court and jury to believe in the matter of ten minutes flames had spread over the entire premises, where it prevented you going to the rear of this building and taking merchandise out of this building? A. That's right.

Q. And that is as true as everything you testified to today?

A. That is the truth. It spread that fast.

Q. Now you have designated, Mr. Moseley, the center circle which has been placed by you immediately between what you have indicated as the two pumps, and the zero mark to the north of the store door is the place where you believe the underground storage tank was? A. Yes.

Q. As a matter of fact, isn't this hole by which you fill that [81] storage tank on this side of this door, on the south side?

A. It was on the north side.

(Testimony of Ross Fred Moseley.)

Q. Directing your attention to the third day of May, 1947, where was the opening to the underground storage tank, which is immediately next to the grocery store, to the north of the door or to the south of the door?

A. I would say north of the door.

Q. And that is your best recollection?

A. That is my recollection.

Q. And your recollection in that respect is as clear as your recollection to all of the other facts you have testified to?

The Court: I think it is for the jury, Mr. Puccinelli, to pass on the credibility of the testimony, not the witness himself.

Mr. Puccinelli: Very well, sir.

Q. Now are there any vents there near the area of the opening, by which you fill the underground storage tanks? A. There was then at the time.

Q. Describe the vent which was built there or constructed there with reference to the storage tank to the extreme west of the cabin that is between the pumps. What was it? Where did it go, the vent to permit the escape of fumes?

A. Well, I tell you, we didn't pay much attention to this. The Standard Oil took care of those things, kept the pumps in repair and looked after the tanks. [82]

Q. Who constructed the vents, the Standard Oil?

A. Well, I imagine they did. I wasn't there when they did put them in, but I was there when they put these others in.

(Testimony of Ross Fred Moseley.)

Q. Do you know who constructed the vents?

A. No.

Q. Is this correct, that the vent which was constructed in connection with this outside under storage tank was a pipe which extended upward to a place immediately underneath the canopy?

A. It should have been.

Q. I will ask you to state whether or not the vent which was used in connection with the underground storage tank immediately next to the building was built at ground level?

A. I didn't see.

Q. Did you see any vents during the four years you have been there, or six or seven months prior to this date, did you see anything in connection with the opening of that underground storage tank?

A. No, I never did.

Q. Now I will ask you to state, Mr. Moseley, whether or not there was a trailer house near the premises? A. There was.

Q. Would you please step down from the stand and designate the approximate location of this trailer house? (Witness complies.)

A. It has got to be down in here. This is as near as I can [83] recollect.

Q. Would you mark it with a "T"? (Witness complies.) Did the trailer house burn as a result of this fire? A. It burned.

Q. Do you recall having a conversation with Ray Ward on that date? A. Yes, sir.

(Testimony of Ross Fred Moseley.)

Q. I will ask you to state if it isn't a fact that when Ray Ward made an offer to help you save the trailer house that you said, "Let it burn?"

A. I don't recall that.

Q. Do you recall having a conversation with a Mr. Whitney? A. I do.

Q. Mr. Elmer Whitney?

A. No, I don't recall that.

Q. I will ask you to state whether or not you ever told any one, when discussing the cause of the fire, that you thought it had been ignited by defective electric wiring, or any other cause?

A. I never made that statement.

Q. While we are on the subject of wiring, would you describe generally the wiring in and about the premises of the bar room, store and cabins?

A. Do you want me to mark it on the map?

Q. Can you? [84]

A. Do you want me to draw a map from the power house to the buildings?

Q. Yes, showing generally the lighting system.

A. A line where the wires run?

Q. A line would be all right, indicating the circuit. If more than one circuit, indicate the number of circuits, where they started from, the general wiring. A. All right. (Witness draws.)

Mr. Platt: As to the clarification, your Honor, may I ask the witness a question or two with respect to this?

The Court: Yes.

Q. (By Mr. Platt): Mr. Moseley, as a matter of fact, the so-called electrical equipment here was

(Testimony of Ross Fred Moseley.)

a private affair, wasn't it? A. That is right.

Q. Operated through what they call a Delco system? A. Yes.

Q. And it wasn't a system that was connected on a general pumping utility circuit? A. No.

Q. In your diagraming on the plat, among other things you will indicate just where this Delco system started? Where it was located? (Witness draws.)

A. Well, I will have to go over here somewhere. This line goes this way and this takes off here and hits the bar room [85] on the north side. From the bar room it is connected up to this line and comes here and ran behind off in here. This took off the main line and went up to the bar room on the north side.

Q. (By Mr. Puccinelli): In other words, Mr. Moseley, the main source of the electrical power was a Delco plant located at the small circle in the direction you have just made, is that correct?

A. That is about right.

Q. A straight line coming directly from there to a circuit, which went around the cabin and into the store?

A. Well, the main line went from the power house to the grocery store.

Q. In other words, the main line was this line going from the power house to the grocery store?

A. That is right.

Q. And then it took off at a point into the bar room and then it took off this main line into another line into the cabin designated 12 by 12?

A. Right.

(Testimony of Ross Fred Moseley.)

Q. And you took off another point into the structure you name as the oil house?

A. That is right.

Q. Now the lighting of the cabin, describe that.

A. Well, there were wires—that goes all around the edge of it—and there were lights up on top on poles above the cabin.

Q. Now was that wire insulated? [86]

A. Sure.

Q. Was the insulated wire itself contained inside any protective covering? That is, was the insulated wire nailed up or attached to the canopy, or was the insulated wire inside a metal tube?

A. Well, there was nothing inside—I don't know whether you call it rubber—it had a covering on it.

Q. Now the wiring underneath the cabin, had any part of that wiring system ever been spliced?

A. Well, I couldn't say as to that.

Q. To your knowledge?

A. To my knowledge it wasn't.

Q. How did you turn the canopy lights on and off?

A. Had a switch on the inside of the building.

Q. To your knowledge had that power plant or wiring ever caused you any trouble during the time you were there as manager?

A. Never did.

Q. And it always worked in perfect order?

A. The system did, yes.

Q. Well, did you ever have occasion to make any splices any place in the wiring system?

(Testimony of Ross Fred Moseley.)

A. Well, I haven't done it. I wasn't an electrician. When I needed that work done I called an electrician.

Q. Did you ever call an electrician?

A. Called somebody when necessary. [87]

Q. Who did you call?

A. Well, different fellows. Dale Klitz came over at different times. He did most of the work for us. That's all I know anything about.

Q. Do you know whether or not Francis Harmer ever did any work there?

A. Well, he might have. I don't think he ever did while I was there.

Q. Now I believe you stated the day in question was a warm day?

A. That's right.

Q. I believe you testified as best you could remember it was about 90 degrees?

A. Yes, that is right, I believe it was.

Q. I believe you testified further that this day the door was open, the door leading into the bar room?

A. That is right.

Q. The door going from the bar room into the grocery store was open?

A. Yes.

Q. The door from the outside into the grocery store was open?

A. All open, to my knowledge.

Q. Were the windows open?

A. No.

Q. I believe you testified that there was a very—I don't [88] know how you expressed it—either a severe wind or a hard wind, is that right?

A. I would call it a hard wind.

(Testimony of Ross Fred Moseley.)

Q. Now what time did Mr. Nielson come to your place that afternoon or that day?

A. Well, I judge between twelve and 1:30.

Q. At the time that he arrived there who, if any one else, was in the bar room?

A. Well, there was myself and Bill Klitz, and I believe that was all.

Q. I will ask you to state if Bill Hack was in the bar room? A. He had been.

Q. Do you recall him sitting in the bar room when M. Nielson was there?

A. He might have been.

Q. Now when you come from Elko going to the Hot Springs, you are traveling in approximately what direction? A. North.

Q. And when you come from Wells to the Mineral Hot Springs, what direction are you traveling, approximately? A. Coming from Wells?

Q. From Wells to the Mineral Hot Springs?

A. That is north.

Q. From Wells traveling to the Mineral Hot Springs necessitates traveling in what direction?

A. North.

Q. On Highway 93? A. That's right.

Q. Therefore, driving from Wells to the Mineral Hot Springs you would approach it from this direction, would you not, the direction indicated by my pencil, which is moving from south to north?

A. That is right.

Q. Now when Mr. Nielson first came there—

(Testimony of Ross Fred Moseley.)

or when did you first realize that Mr. Nielson was there?

A. Well, when he drove up in front of the building.

Q. Now I ask you to state if he drove in from the south going north?

A. He drove in from the south.

Q. The front of his car was headed in a general northerly direction?

A. I didn't get your question.

Q. So that the front of his car was going in a northerly direction? A. That is right.

Q. Was there any other car under that canopy?

A. Yes.

Q. Whose car?

A. Mr. Klitz had a car sitting there with oil on it.

Q. Here by the oil house? [90]

A. Yes, sir.

Q. I will task you to state whether it isn't a fact that Mr. Klitz had his automobile parked partially underneath that canopy?

A. Well, that could be possible. That is my guess, it was close to the oil house, closer to the oil house than the canopy.

Q. Therefore, your testimony is to the effect Mr. Klitz' car was not parked partially under the canopy.

A. It was very close, but as I said, I couldn't state.

Q. Will you show on the blackboard, to the best

(Testimony of Ross Fred Moseley.)

of your ability, where, in your opinion, that automobile was parked belonging to Mr. Klitz?

A. I will probably get the wrong place.

Q. Will you designate that as "Car" or some other designation? What kind of a car was it, if you know?

A. It was a Ford pick-up.

Q. What model?

A. Well, I guess '30 model.

Q. You had to crank it to start it, did you?

A. I don't know, I didn't start it.

Q. Have you ever seen it?

A. No—what is the question?

Q. I asked you if you ever seen the car. Did you say no?

A. Oh yes, I saw the car.

Q. You don't know how you start it, whether with self-starter or [91] a crank?

A. Well, I imagine a self-starter.

Q. When Mr. Nielson stopped his truck, I believe you testified he started to fill the underground storage tank which is immediately next to the store?

A. Yes, that is the one he filled first.

Q. Where were you at the time?

A. I was inside the bar room.

Q. Now where in the bar room were you?

A. Oh, I was all over the time he was in there. I was in different places.

Q. You were able, from your position in the bar room, to see Mr. Nielson begin filling the storage tank immediately next to the store, is that correct?

A. Well, I didn't know if he was filling. I saw him drive up there. I just seen him drive up there.

(Testimony of Ross Fred Moseley.)

Q. As a matter of fact, then, when you testified that you saw him fill the underground tank which is next to the store, that is something which you are assuming and something which you do not know of your own knowledge, isn't that a fact?

A. Well, if I say I saw him fill it, I saw him drive up, but I didn't see him fill the tank.

Q. So when you testified on direct examination what he did was to fill that tank, you were simply assuming or guessing?

A. Well, that was the one he filled first. [92]

Q. Did you see him fill it?

A. No, but he evidently did or he wouldn't go to work on the other tank.

Q. Do you know that he filled it? A. No.

Q. Now when he came into your place, I will ask you to state whether or not you know, of your own knowledge, that he was removing gasoline from his truck and putting it into that underground storage tank? A. Did I know that he was?

Q. Yes.

A. That was the reason for him being there.

Q. I repeat my question. Do you know, of your own knowledge, whether or not he was removing gasoline from his truck to that underground storage tank at the time he walked into the saloon, the first time?

A. I couldn't see any gas line, but I presume that was what was going on.

Q. As a matter of fact, your testimony is predicated primarily on presumption, isn't it, Mr. Mose-

(Testimony of Ross Fred Moseley.)

ley? Now, Mr. Moseley, relate, to the best of your recollection, just exactly what he did when he came into the bar.

A. Well, he bought a drink, soft drink, and he put some coins in the picture machine, brought a stool off and watched the pictures. [93]

Q. How long did he remain there?

A. Until he saw that fire.

Q. It is your testimony now that he noticed the fire while the truck was filling this tank?

A. Beg pardon?

Q. Is it your testimony that he observed the fire while he was in the act of filling the underground storage tank immediately next to the store?

A. Go ahead and ask me that question again.

Q. I believe you testified, Mr. Moseley, when he parked his truck underneath the canopy next to the store, that he came into the bar room, the saloon?

A. That is right.

Q. That he put a coin in this juke box, moving picture machine? A. That is right.

Q. Took the stool and put it on the floor, in the middle of the floor? A. That is right.

Q. Sat down and watched the movie, is that right? A. Yes.

Q. How long did he remain there?

A. Well, until he went out and changed his truck.

Q. How long was that, to the best of your recollection? A. Oh, about 15 minutes.

(Testimony of Ross Fred Moseley.)

Q. Now when he went out and moved the truck, where did he move [94] it to?

A. To the other tank.

Q. Whose position you have designated?

A. That is right.

Q. In other words, he moved his truck from its position under the canopy to a position outside the canopy. How did he move his truck, did he back up or go around?

A. I couldn't say as to that. I wasn't observing him that closely.

Q. Did you see him move his truck?

A. I saw the truck moving.

Q. Was he going backward or forward?

A. Well, I wouldn't say whether he backed up or whether he drove around. Anyway, he got over to that tank.

Q. That is when he started filling the underground storage tank? A. That is right.

Q. The location of which is approximately between the two pumps, is that correct? A. Yes.

Q. Now I want you to describe to this jury and the Court, if you can, the type of tank which was on the truck and from which Mr. Nielson was delivering gas.

A. He had three storage tanks on his truck, three compartments. It was a Ford truck. [95]

Q. What kind of a bed did it have?

A. Oh, just an ordinary truck bed with all these tanks, tanks built on it.

Q. Commonly known as a flat rack?

(Testimony of Ross Fred Moseley.)

A. Yes.

Q. Made of wood? A. I presume.

Q. Do you know, Mr. Moseley, from which of the three tanks he was delivering gas when he began to fill this outside underground storage tank?

A. No, I don't know.

Q. In that connection, Mr. Moseley, I will ask you to state where the connection is to which the hose is attached, so as to permit the flow of gasoline from the tank on the truck into the underground storage tank, the end of the truck or side of the truck, or where are they, if you know?

A. Well, my recollection, in each tank they have a place where they connect it.

Q. And that is generally on the side closest to the point that they are filling, isn't that correct?

A. Yes.

Q. In this case it would have been on the side closest to you, that is, on the right-hand side of the tank? A. That's right. [96]

Q. Now after he had moved his truck to that position that you have indicated on the map, on this drawing, would you please relate, to the best of your recollection, what he did, what Mr. Nielson did? A. Well, he came back in the building.

Q. What did he do when he entered the building the second time?

A. Went back on the stool and watched the pictures.

Q. Where was Mr. Klitz at that time, if you recall?

(Testimony of Ross Fred Moseley.)

A. He was at the rear end of the building.

Q. That has been designated by an "x," extreme easterly end of the bar?

A. That is right. He was right close to the pictures.

Q. What was he doing?

A. Well, apparently—I don't know—he was just watching the machine operate.

Q. Isn't it a fact that the machine had started to flicker to such an extent that it was not visible and Mr. Klitz was seeing if he could repair it?

A. Well, it could be.

Q. Where was Mr. Nielson?

A. He was sitting about in the middle of the room.

Q. Was Bill Hack there at that time?

A. I don't know whether he was there at that time or not. He was in and out. [97]

Q. Where were you?

A. I was in the building.

Q. Where? A. Behind the bar.

Q. Now how long after Mr. Nielson returned to the building inside the saloon was the fire discovered? A. The last time.

Q. Was it discovered more than once?

A. The last time he came in the building.

Q. Is that when you discovered the fire?

A. Ask that again.

Q. You say Mr. Nielson came back in the bar, is that right? A. Right.

(Testimony of Ross Fred Moseley.)

Q. And sat down and watched the movie?

A. That is right.

Q. In a machine which Mr. Klitz was attempting to repair? A. Yes.

Q. How long after he came in and sat down in the middle of the floor on the stool was the fire started or observed?

A. Well, possibly fifteen, maybe twenty, minutes.

Q. At that time where were you?

A. I was behind the bar.

Q. Is that the bar designated, behind the counter?

A. That wasn't my position all the time he was there.

Q. Where were you when you first saw the fire?

A. I was right there behind the counter.

Q. In that connection I will ask you to state if you noted the fire from your own observation or was it called to your attention?

A. Well, nobody hollered "Fire." I saw it about the time Mr. Nielson did.

Q. Mr. Nielson was here looking at a machine at the east end of the building?

A. That is correct.

Q. With his back to this end of the building?

A. That is right.

Q. The west end. Now did you call the fire to his attention or did he see it?

A. I imagine he saw it. I think he and I saw the fire.

Q. Therefore your testimony is that Mr. Nielson was facing east? A. That is right.

(Testimony of Ross Fred Moseley.)

Q. Looking at a movie? A. That is right.

Q. And without anybody calling it to his attention, he saw a fire which was to his back and outside the building?

A. He evidently did. Nobody hollered "Fire."

Q. Just exactly what did you do?

A. I got out of there as quick as I could.

Q. How did you leave the premises? [99]

A. On the run.

Q. Out the front door? A. Yes, sir.

Q. The front door of the bar? A. Yes, sir.

Q. And how did Mr. Nielson leave?

A. Well, he was coming pretty fast too.

Q. I believe you testified on direct examination, Mr. Moseley, that you and Mr. Nielson got out of that door just about the same time?

A. We did.

Q. Now I want you to describe just exactly where the fire was when you went outside.

A. Up under the canopy and all over the cover.

Q. Now I want you to describe exactly what Mr. Nielson did.

A. Well, he did something to the truck. He ran up to it and then the next thing he got in the cab.

Q. I will ask you to state if he detached the hose from that tank?

A. Well, I wouldn't say just whether he did or not.

Q. I will ask you to state if he pulled away, pulling the hose with him? A. Yes.

Q. Therefore it follows, does it not, Mr. Moseley.

(Testimony of Ross Fred Moseley.)

from your testimony, that if the hose was attached to the tank flowing gasoline, and Mr. Nielson drove away and didn't take the hose [100] with him, he must have detached it from the tank from which he was delivering it. A. Yes.

Q. And he was doing that at a time he turned off the flowing gasoline, at a time when that truck was completely enveloped in flames?

A. That is right.

Q. He went right straight in the flames and did it? A. That is right.

Q. Turned off the flowing gasoline?

A. That's right.

Q. Did you see Mr. Nielson at any time afterward? A. Yes.

Q. I will ask you to state if he was severely burned?

A. Well, apparently he was. I wouldn't state severely, but badly.

Q. Now I believe you stated that at the time that fire broke out there was nothing in operation in the store? A. That's right.

Q. The movie machine was operating, wasn't it?

A. Yes.

Q. Therefore, is it your desire now to change your testimony to this extent, that there was nothing operating in the premises except the movie machine?

Mr. Parry: I object to the form of the question, of [101] changing testimony.

The Court: Objection sustained.

Q. What is your testimony now?

(Testimony of Ross Fred Moseley.)

A. Well, there wasn't any stove going any place.

Q. Were there any stoves going?

A. There were not.

Q. Were there any electrical appliances in operation at the time of the fire?

A. Nothing outside that movie.

Q. Now on direct examination you testified concerning a refrigerator. That was a kerosene refrigerator, was it not?

A. Yes, kerosene, oil.

Q. And when in operation that has an open flame, does it not?

A. I don't know. I don't know much about those refrigerators.

Q. Had you ever had occasion to use that refrigerator prior to this day? A. What?

Q. Did you ever have occasion to use the refrigerator prior to the third of May, 1947?

A. No.

Q. It had never been used during the time that you were on the premises?

A. Oh, it was in there when I first went to the place, but then he put in an electric.

Q. In other words, you were present on the premises when that [102] refrigerator was actually being used?

A. Yes, I was there when Mr. Barnes was there, but I never tended it.

Q. Did you ever examine it to the extent of determining that when it was in operation there was an open flame?

(Testimony of Ross Fred Moseley.)

A. I told you I never tended it.

Q. Would you come down to this board and designate the place where that kerosene refrigerator was the day of the fire?

A. Well, it was in the grocery store.

Q. Will you please come down and point out where in the grocery store?

A. Well, it was sitting right in here, this point.
(Indicating.)

Q. Would you mark that with an "R"? (Witness complies.) At your best estimate, how far was this refrigerator from the door leading into the store?

A. Well, I would judge about four feet.

Q. In other words, from the opening to the refrigerator was a distance of approximately four feet?

A. Yes.

Q. And this door was open? A. Yes.

Q. Now you say that there was a wind blowing that day, a hard wind? A. That's right.

Q. It was blowing south and west? [103]

A. From the southwest.

Q. Am I correct then in saying that the wind was blowing generally in this direction?

Mr. Parry: That is objected to——

Q. What I would like to know, just which way the wind was blowing, like this, or like this?

A. From the southwest.

Q. Like this? A. Southwest.

Q. In other words, from this direction it was

(Testimony of Ross Fred Moseley.)

blowing right straight in the direction of the canopy and that open door? A. Yes.

Q. Now, Mr. Moseley, I want you to state whether or not from the instant that you discovered the fire you did anything at all to combat the flames or to salvage any of the equipment or merchandise on the premises?

A. I did not. It was impossible.

Q. Did anybody fight that fire?

A. Well, after help got to it, we did the best we could do, but nothing we could do.

Q. Who did it? A. Who do you mean?

Q. Name the individuals.

A. Oh gosh, there were fifty or a hundred.

Q. Fifty or a hundred there in Contact, Mr. Moseley? [104] A. No, on the way.

Q. Do you recall the names of any of them?

A. Yes.

Q. Who?

A. Well, Mr. Zilliox was there, Mr. Ray Ward, Joe Hollis.

Q. Now would you describe generally what they did? A. What they did?

Q. Yes, in fighting this fire?

A. There wasn't anything they could do.

Q. Now, Mr. Moseley, you said that they fought the fire. Will you please tell this Court and jury just exactly what they did?

A. Well, there was no canopy after they got there. Some of the boys helped Nielson on his truck, helped get the fire extinguished on that. As far

(Testimony of Ross Fred Moseley.)

as the building, there was nothing they could do.

Q. Mr. Moseley, you stated both on direct and cross-examination that there were individuals who fought that fire at Hot Springs.

Mr. Parry: I object to this form of question. It is not according to the record—no such statement.

Mr. Puccinelli: I ask for the record in that respect.

Q. Did anybody fight the fire at Hot Springs?

A. Well, no. I will say no; there was nothing they could do.

Q. Isn't it a fact that previously you testified they did?

A. Well, they made an effort. There was nothing they could do to the building and trailer. They did make a little effort [105] to save them.

Q. You say they made some effort?

A. Yes.

Q. I want you to relate exactly what effort they made. What did they do?

A. They did nothing but try.

Q. So they fought the fire by doing nothing—is that your answer? A. Yes.

Q. As a matter of fact, no one at those premises, as far as you can remember, did anything, attempt to stop the fire or save any of the merchandise, isn't that the truth?

A. There were attempts made, but it was hopeless.

Q. Isn't it a fact, Mr. Moseley, that what actu-

(Testimony of Ross Fred Moseley.)

ally happened was that everybody that was there went up on the side hill and watched the fire?

A. No, I don't think so.

Q. That is not true?

A. I don't think that is a true statement.

Q. Now during the time when Mr. Nielson drove away and the time he entered this truck, it was ablaze, was it? A. Yes.

Q. He drove it off? A. He did.

Q. How far did he drive it? [106]

A. About three hundred yards.

Q. In what direction? A. North.

Q. I am going to ask the privilege at this time—you check me if I am in error—highway 93 is generally like that, is it not?

A. It makes a little curve there.

Q. A slight turn, but for the sake of simply explaining to the jury, Highway 93 immediately joins on to the approximate area where these two outside pumps were? A. Yes.

Q. You say Mr. Nielson drove north—was he on Highway 93? A. Yes.

Q. And to the best of your recollection it was about three hundred yards?

A. I judge.

Q. I believe you stated that among other things you had in the store building \$300 in the bar register, \$75 in the grocery register, \$800 underneath the counter and another thousand dollars underneath the counter? A. That's right.

(Testimony of Ross Fred Moseley.)

Q. Now what time did you open business on that day? A. In the morning?

Q. Yes. A. Seven o'clock in the morning.

Q. I believe you called one of the registers as being the bar register, is that correct?

A. Yes, sir.

Q. Is that the cash register used in connection with the operation of the bar?

A. That's right.

Q. Now is it generally your practice to keep \$300 in cash in the cash register?

A. Not at all times.

Q. How much did you start the day out with generally?

A. Usually had \$300 in the bar and about that much in the grocery and cash register. We had the registers separate.

Q. But it was your practice at the beginning of a business day to put \$300 in currency and cash in both the bar register and also in the grocery register? A. That's right.

Q. Then I believe you stated that you had \$800 which belonged to the card table?

A. That is right.

Q. What time did you generally open?

A. Some days didn't open at all.

Q. Was it in operation that day?

A. No, not that day.

Q. Was the dealer there? A. No. [108]

Q. Did the dealer ever come there on the day of the fire?

(Testimony of Ross Fred Moseley.)

A. No, he wasn't there the day of the fire.

Q. Now even though the game wasn't in operation, even though your dealer did not come there on the day of the fire, you nevertheless kept \$800 of the gambling money underneath the lunch counter?

A. That is where it was.

Q. Was that your general practice?

A. It was in my charge.

Q. And as a general practice did you always bring the money in there, whatever cash there might be on the premises?

A. I usually took the cash box in my cabin at night. I did when I was on day shift.

Q. And this day was a working day, or what did you do that day? Did you take the cash with you?

A. I brought the cash box back in the morning.

Q. When you opened up?

A. That's right.

Q. And you always brought the gambling money with you, whether you were going to operate the game or not?

A. Yes.

Q. That game was licensed?

A. Absolutely.

Q. I believe you stated that you had a thousand dollars in what you call a lock box? [109]

A. A slot box, slot machine.

Q. You kept a thousand dollars belonging to the slot machines?

A. That's right.

Q. And what denominations?

A. Currency and silver.

Q. How much of that thousand dollars was in silver?

A. Well, about half of it.

(Testimony of Ross Fred Moseley.)

Q. Five hundred. How many slot machines did you have on the premises? A. Four.

Q. And what denominations were they?

A. They were from five cents up to half dollars.

Q. Well, how many nickel machines did you have? A. One nickel machine.

Q. How many ten cent ones? A. One.

Q. How many quarters? A. One.

Q. And how many fifty cent machines?

A. One.

Q. I am not sure that I understand—did this thousand dollars represent money which had been taken from the slot machines?

A. That's right, belonged to the slot machines.

Q. It was the take from the slot machines?

A. Yes, the take, slot machine money. [110]

Q. How often did you bank, or Mr. Herzinger bank, the proceeds of the gambling from the four slot machines?

A. Well, usually about once a week. This particular time it had run over Saturday, been about ten days since he banked.

Q. And was the take from the four slot machines in ten days?

A. No, it would be the take, but it was the money that belonged to them that accumulated.

Q. Where had the money come from, if you know? A. Where had it come from?

Q. Yes, the thousand dollars?

(Testimony of Ross Fred Moseley.)

A. From the slot machines.

Q. In how long a time?

A. Well, possibly ten days' time.

Q. So that the four machines yielded you approximately \$100 a day, is that correct?

A. Well, I wouldn't make a definite figure. Some days it would be better than others.

Q. And that was always kept underneath this lunch counter? A. Not always.

Q. But it was this day?

A. It was that day. Taken out of there at night.

Q. And you had a thousand dollars worth of checks? A. Yes.

Q. Do you recall any of the checks?

A. Oh yes, I had a list of them. [111]

Q. What? A. I had a list of them.

Q. From your memory do you recall any of the checks? A. Any particular ones?

Q. Yes.

A. Oh yes, had some on the U. C. Land and Cattle Company. We had some pension checks, had some highway checks, we had checks from the first of the month.

Q. Where did you keep those? Where were they the day of the fire?

A. They were in the cash box, but that is what we call the bar box.

Q. So therefore we have five different places where money was kept in that bar room?

A. That's right.

Q. There was the bar cash box, right?

(Testimony of Ross Fred Moseley.)

A. Yes.

Q. Then there was the, I believe you refer to as the grocery register? A. Grocery register.

Q. Then there was the crap table cash?

A. That's right.

Q. Which is in one container, and then there was the slot machine container?

A. That is right. [112]

Q. And then there was a fifth container in which you kept the checks separately?

A. That is right.

Q. And they were all there underneath that lunch counter that day? A. Yes.

Q. And is that generally where you kept all these containers, underneath the lunch counter?

A. During the day time.

Q. Did you make any attempt to remove any part of the cash, that is the silver, currency or checks, from those premises after having discovered the fire? A. No.

The Court: This is a good time to take a recess.

(Recess taken at 4:30 p.m.)

Thursday—February 9, 1950, 10:00 A.M.

All attorneys present.

Presence of the jury stipulated.

Mr. Moseley resumes the witness stand on further

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Moseley, yesterday I believe, at the beginning of your direct examination, you testified that you had prepared this plat? [113]

A. That is right.

Q. And that had been drawn from your recollection of the permises, is that correct?

A. Yes.

Q. This plat differs, does it not, from the map which you have drawn on the board?

A. Some.

Q. And you drew this with the assistance of your counsel? A. I did.

Q. And with their assistance, your memory was refreshed, is that correct? A. Yes.

Q. Now I would like to inquire, Mr. Moseley, about the electrical fixtures. When you first went to the Mineral Hot Springs, who was operating the place? A. Mr. Brown.

Q. And it was during the time that you were there that Mr. Herzinger purchased Mr. Brown's interest? A. That's right.

Q. And you remained at the place?

A. That's right.

(Testimony of Ross Fred Moseley.)

Q. Now from the day that you went to the Mineral Hot Springs up to the date of the fire, which was May 3, 1947, had those electrical fixtures or appliances or wiring ever been changed in any way, to your knowledge? [114]

A. Not to my knowledge.

Q. So that at the date of the fire they were substantially in the same condition and position as the date that you went on the premises during the ownership of Mr. Brown?

A. To my knowledge.

Q. Do you recall on the day of the fire where Mr. Zilliox was?

A. Well, right after the fire, after the building had caved in, I saw Mr. Zilliox on the premises.

Q. Did you see him at any time prior to that?

A. Not that day.

Q. How much time had transpired, to your recollection, between the time that you first noted the fire and the time that you saw Jim Zilliox?

A. Possibly two hours.

Q. You saw him two hours later?

A. About.

Q. I believe you testified yesterday, both on direct and cross-examination, Mr. Moseley, that some of the boys helped Jim Zilliox put the fire out on Mr. Nielson's truck?

A. That was my impression.

Q. That was another assumption?

A. That's right.

(Testimony of Ross Fred Moseley.)

Q. Did you see Mr. Zilliox do anything toward fighting the fire at Mineral Hot Springs proper?

A. Yes, there was a trailer house that was just about down, a [115] little left. I saw Mr. Zilliox take some water over there and throw on the remains of that trailer.

Q. Was that two hours after the fire started?

A. Possibly.

Q. That fire burned for two hours?

A. Well, it was still burning on this trailer.

Q. What was the condition of the premises at that time, that is, the saloon and grocery?

A. The main premises?

Q. Yes. A. They were all mashed.

Q. And the only thing that you saw Mr. Zilliox do was lend his efforts toward extinguishing the fire which was on the trailer house?

A. As I remember.

Q. And that is the trailer house which you have designated at the bottom of this map on the black-board by the letter "T"?

A. That's right.

Q. By the way, where was Bill Hacker at that time?

A. He was on the premises.

Q. What was he doing?

A. I couldn't say.

Q. Now yesterday you testified on cross and on direct examination that among other things there were destroyed approximately [116] a thousand dollars worth of checks?

A. That's right.

Q. Do you remember some of the checks?

A. Yes.

Q. Would you name for me the checks that you

(Testimony of Ross Fred Moseley.)

recall having cashed; that is, who were they made in favor of?

A. I couldn't tell you who they were made in favor of.

Q. Do you remember the amount?

A. Oh, possibly some of them.

Q. Would you please give me the amounts of some of the checks?

A. Well, some of the company checks, they would run around a hundred and hundred and twenty-five.

Q. What do you mean by company checks?

A. Well, we call them U. C. Land and Cattle Company.

Q. Now you say those were between \$100 and \$125? A. That's right.

Q. How many of those checks did you cash?

A. I couldn't give you a definite answer.

Q. To your best recollection?

A. Well, I imagine about six hundred, five hundred or six hundred.

Q. Do you recall any of the men who presented these five or six hundred dollars of company checks to you? A. No, I couldn't.

Q. Now relate to me some of the other [117] checks.

A. The men they were drawn to?

Q. Either the men they were drawn to, the amounts, or the company upon whom they were drawn.

A. They were drawn on the U. C. Land and Cattle Company.

(Testimony of Ross Fred Moseley.)

Q. We have five or six of those?

A. That's right.

Q. That was \$500 or \$600?

A. Approximately.

Q. You testified there was a thousand dollars lost.

A. Well, there were other checks.

Q. I would like to inquire into the balance of the checks—what company issued them, in whose favor and in what amount, if you recall.

A. We had some government checks there, some of the soldier boys that had those government checks.

Q. How many of them?

A. Well, there was denominations from \$15 up to \$50.

Q. And how many of those checks?

A. Well, I would say we had possibly a couple of hundred.

Q. A couple of hundred checks?

A. A couple of hundred dollars in government checks.

Q. Now the balance.

A. Well, right after the first of the month we always got those pension checks up there, old pensioners' checks. They ran around \$50 to \$55. We had possibly a couple of hundred of [118] them.

Q. So that I may be correct, you had between \$500 and \$600 worth of U. C. Land and Cattle Company checks?

A. Yes.

Q. Some \$200 in government checks, that is, United States government?

A. Yes.

(Testimony of Ross Fred Moseley.)

Q. And some \$200 in pension checks?

A. That's right.

Q. Did you ever report the loss of these checks to the U. C. Land and Cattle Company?

A. Yes, they were reported.

Q. Were they reimbursed? A. No.

Q. You never got your money back although you told them you had lost the checks which they had issued to their men? A. That's right.

Q. Who did you report your loss to, insofar as checks relating to the U. C. Land and Cattle Company?

A. We reported them to Mr. McLean, the book-keeper at the ranch.

Q. Just what did you tell Mr. McLean?

A. We told him that we cashed these checks but we didn't have a list of them and we presumed that he did. Well, he asked for six months to verify those checks. We were never reimbursed.

Q. Mr. McLean asked you, in substance, to allow him a period [119] of six months to verify the loss, is that correct? A. That's right.

Q. At the end of the six months did you go back to Mr. McLean and ask to be reimbursed for the loss of those company checks?

A. Well, we talked about it every time. Never got an adjustment made.

Q. So that as of today, the year 1950, you have not been reimbursed? A. That's right.

Q. And no steps have been taken?

A. That's right.

(Testimony of Ross Fred Moseley.)

Q. To effect a collection of that money, save and except to meet with him and discuss it?

A. That is right.

Q. How many times was it discussed with the U. C. Land and Cattle Company since that date?

A. We never did discuss it with anybody but Mr. McLean.

Q. How many times?

A. Oh, possibly three or four different times.

Q. What did Mr. McLean say the second time you went back, after the six months had expired?

A. Well, he had been pretty busy with company's business and he hadn't had time to give it his attention.

Q. Did he ask for additional time?

A. I think that was the deal. [120]

Q. To come back later? A. Yes.

Q. Did you go back later?

A. No, I don't believe I did.

Q. Well now you said you talked to him five or six times. A. That's right.

Q. The first time you talked to him he said he wanted six months? A. That's right.

Q. Then at the end of six months you went back and talked to him the second time?

A. That's right.

Q. Now tell me about the other three times.

A. Well, he come up to Hot Springs and we just discussed it but there was never any action taken.

Q. What reason did he give you on the last three times for nonpayment of the checks?

(Testimony of Ross Fred Moseley.)

A. Well, he was busy with the company's business.

Q. He was busy with the company's business?

A. That's right.

Q. Wasn't this company business?

Mr. Parry: We object to that as argumentative.

The Court: Objection sustained.

Q. The U. C. Land and Cattle Company is a large industry, is it not? It was called by counsel an empire. [121]

A. It was at that time.

Q. And yet you have been unable to effect a collection of \$600 from the U. C. Land and Cattle Company? A. That is right.

Q. Let us go to the government checks. What, if any, effort did you make to collect these checks from the government, the army checks?

A. We made inquiries as to how we could collect them. We were advised that they were the same as currency.

Q. You were advised that a government check was the same as currency and if destroyed couldn't be recovered? A. Yes.

Q. Who advised you that way?

A. You mean what was his name?

Q. Yes.

A. Well, Del Hardy at Contact was one of them.

Q. Who was he?

A. You mean his occupation?

Q. Yes.

A. Well, he was deputy sheriff, I believe.

(Testimony of Ross Fred Moseley.)

Q. As a matter of fact, he was constable in Contact, wasn't he? A. Well, possibly.

Q. Did you rest upon the advice given to you by the constable in Contact, or did you make further inquiries to see whether or not you could recover these checks? [122] A. No.

Q. You stopped with the advice of the constable of Contact? A. That's right.

Q. Now what about the pension checks, what effort, if any, did you make to collect the pension checks?

A. We collected three pension checks to my knowledge, had new checks issued.

Q. So you have recovered a portion of that thousand dollars then?

A. Well, we will have. We got three pension checks.

Q. You got them back? A. Yes.

Q. And you cashed them? A. Sure.

Q. So then when you testified you had lost a thousand dollars in checks that wasn't a correct statement?

A. Well, we had a thousand dollars in checks.

Q. Part of it you recovered?

A. That is what we recovered, three checks, to my knowledge.

Q. How much were they?

A. Those pension checks were about \$55 each.

Q. So you have recovered approximately \$165?

A. Approximately.

Q. So deducting the \$165 from the thousand

(Testimony of Ross Fred Moseley.)

dollars, the total which remains is actually what you claim you have lost as the [123] result of the fire, isn't that correct?

A. That would be about fair.

Q. By the way, when was the last time you talked to Mr. McLean about the \$600?

A. Oh, it was probably a year after the fire.

Q. That would be approximately May of 1948, is that right? A. Yes.

Q. And no further meetings or discussions have been had with Mr. McLean since May of 1948?

A. No.

Q. By the way, Mr. Moseley, yesterday you testified on direct examination this was a frame structure. What was the front of the grocery store building?

A. What do you mean, what did it consist of?

Q. Yes. A. The structure?

Q. Yes.

A. Well, it was a frame structure. It was mostly glass front.

Q. In fact, it was covered with sandstone, wasn't it, a sandstone front on that store?

A. Oh, you mean the building?

Q. Yes.

A. Yes, the main structure was sandstone.

Q. What did you sell in that store?

A. Sold groceries, kerosene, overalls. [124]

Q. What kind of groceries, Mr. Moseley?

A. Anything we found room for.

Q. Did you sell meat? A. Yes, sir.

(Testimony of Ross Fred Moseley.)

Q. Fresh meat? A. No, sir.

Q. What kind of meat? A. Cured meat.

Q. What kind of cured meats?

A. Well, hams and bacon.

Q. Hams and bacon. Where did you keep the ham and bacon?

A. Oh, different places about the store, wherever it was convenient.

Q. In the refrigerator? A. No.

Q. Of any kind? A. No.

Q. Did you sell butter?

A. Yes, we had butter.

Q. Where did you keep the butter?

A. Kept it in cartons.

Q. In the refrigerator?

A. Not at that time.

Q. You kept butter in the store without refrigeration?

A. Well, we had a refrigerator in the bar room.

Q. But that was in the bar room, wasn't it?

A. That's right.

Q. So that if you were in the store and wanted to sell a pound of butter, you had to leave the grocery and go in and get it and come back?

A. We did a lot of times.

Q. But you had no refrigeration in the store, although you sold cured meats and butter?

A. Well, our butter we kept in the cooler in the bar room most of the time. Depends on the weather.

Q. Where did you have the butter stored on this day, if you recall?

(Testimony of Ross Fred Moseley.)

A. Well, it could have been some in the grocery store and some in the bar room.

Q. You said it could have been. Do you know where it was?

A. I don't know as I can say now. We might not have had any butter on hand that day.

Q. Do you know if you had on that day?

A. No.

Q. You were the manager of this place?

A. That's right.

Q. Did you sell milk? A. No.

Q. At no time? A. Yes, we did at [126] times.

Q. Now when you had milk on hand, where did you keep it? A. Put it in the cooler.

Q. Where is that? A. In the bar room.

Q. So although you had a store, out of which you were dispensing groceries, whatever refrigeration you needed in connection with the store you got in the bar room? A. That's right.

Q. Yesterday you testified that some of your cured meats you had in the refrigerator which was in the store, which on this map you designated by the circle? A. That is right.

Q. Did you have cured meats in it that day?

A. We must have because there was some in there after the fire.

Q. Did you see the remains of those meats in that refrigerator after the fire?

A. I saw a portion of it.

Q. Who was with you when you saw it?

(Testimony of Ross Fred Moseley.)

A. I wouldn't know.

Q. How long after the fire?

A. Possibly the next day.

Q. So that the next day you now testify that you saw the remains of meat in this refrigerator?

A. That's right. [127]

Q. Which was in the store?

A. That is right.

Q. And that was a kerosene operated refrigerator?
A. Well, it was an oil refrigerator.

Q. Now, Mr. Moseley, do you know anything about the mechanics of that refrigerator, that oil refrigerator? Do you know how it worked?

A. No.

Q. You said you knew it was an oil refrigerator. How did you know that?

A. Well, that is the impression I had of it.

Q. Is that another assumption?

A. That is what I was told it was.

Q. Did you ever put any oil in it?

A. Never did.

Q. Who took care of it? A. Nobody.

Q. Well, did you have an unlimited quantity of oil in there that you never had to take care of it?

Mr. Parry: Objected to as argumentative. It is the evidence of the witness it was not operating.

Mr. Puccinelli: That is not the record.

The Court: Objection will be overruled.

Q. Did you understand my question?

A. Well, not thoroughly. [128]

(Testimony of Ross Fred Moseley.)

Q. You have testified that this was an oil refrigerator?
A. I did.

Q. You testified that your knowledge of that came from what some one told you?

A. It was an oil refrigerator to my knowledge.

Q. Well, did you ever put any oil in it?

A. I never did.

Q. Did any one put any oil in it?

A. It was not in operation at the time. Hadn't used that since January, when it was in the bar room.

Q. Let us go back to January, when it was in the bar room. When you operated it, how was it operated?

A. Operated by coal oil, I presume.

Q. Kerosene or coal oil? A. Yes.

Q. What would you do in order to get refrigeration?

A. I never tended it. I never took care of it.

Q. But you do know it was kerosene or coal oil?

A. I presume it was.

Q. That was needed to operate the refrigerator?

A. Yes.

Q. Mr. Moseley, you testified that of the total of \$200 in pension checks you had recovered \$165?

A. Yes.

Q. Whose checks did you recover? [129]

A. Well, as I remember, there was one Mr. Ole Hause and Benny Hart and I don't just recall the other one. It could have been Mr Hazelwood, but I wouldn't say positively.

(Testimony of Ross Fred Moseley.)

Q. Is that Tex Hazelwood?

A. That's right.

Q. Whose check remains unknown at this time?

A. Well, we wouldn't know every person.

Q. Well, have all of your pensions checks been collected?

A. Well, those two are all I have in mind now.

Q. You said there were four altogether?

A. Those three.

Q. You said you collected three?

A. But it is not clear in my mind who the other one was.

Q. There remains one which has not been collected.

A. No, the others have not been collected. To my knowledge there were four of them collected.

Q. So that the \$200 represented by pension checks have all been collected? A. Yes.

Q. And that figure of \$200 has not actually been lost because you have been reimbursed?

A. That's right.

Q. So that reduces the amount of unrecovered checks for the present at least down to \$800?

A. Approximately. [130]

Q. Did you see Ray Ward there that day?

A. Yes, sir.

Q. In a conversation which related to the trailer house, do you recall stating to Ray Ward, "Let her burn"?

A. No.

Q. Would you say that you did not make such a statement? A. I said no.

(Testimony of Ross Fred Moseley.)

Q. In other words, you did not make such a statement? A. Not to my knowledge.

Q. The wiring underneath the cabin, I believe you stated was insulated wire? A. Yes.

Q. Was that wire in turn contained in a conduit?

A. To the pumps it came down from the main line between the grocery store and cabin. It was run through pipe under the ground to the pipes.

Q. Underneath the canopy there were many lights, were there not? A. That is right.

Q. Every so often there would be a bulb?

A. That is right.

Q. Describe to me the connection at the different points where the bulbs were going around the canopy. A. What do you mean?

Q. Well, the socket—how was it put in?

A. Well, those bulbs screwed into the socket.

Q. You had to cut the metal container, did you?

A. No, that was rubber covered around the canopy. That was insulated with rubber around the canopy, the wire that went around the canopy.

Q. The wiring underneath the canopy wasn't in any metal or other protective conduit?

A. No, not around the canopy it wasn't in metal.

Q. I show you a photograph which has been marked Defendant's Exhibit OA for identification, and ask you if you are able to identify the premises therein depicted?

A. Well, that is a photograph of the buildings.

Q. I ask you if the photograph there depicts the

(Testimony of Ross Fred Moseley.)

buildings substantially in the same condition as they were the date of the fire?

A. Well, that is a very true photograph.

Mr. Puccinelli: I offer this in evidence.

The Court: Any objection?

Mr. Wilson: No objection.

The Court: It may be admitted in evidence.

Q. I show you what has been marked Exhibit OB for identification, and want you to examine it and identify it, if you can. What is it?

A. That is the place the day before the fire.

Q. A different view?

A. That's right. [132]

Q. I will ask you if this photograph represents substantially the premises as being in the same condition as they were the day of the fire?

A. As they were the day before the fire.

Q. Just immediately preceding the fire?

A. That's right.

Mr. Puccinelli: I offer this in evidence, if your Honor please.

Q. I now show you what has been marked Defendant's Exhibit OC for identification and Defendant's Exhibit OD for identification. I want you to examine them and state what is therein depicted, if you can.

Mr. Wilson: No objection to OB.

The Court: It may be admitted.

Q. What are those, Mr. Moseley?

A. Those are photographs of the buildings.

(Testimony of Ross Fred Moseley.)

Q. Do they represent substantially those premises as being in the same condition as they were at the time just immediately preceding the fire?

A. I would say yes.

Mr. Puccinelli: I offer Exhibits OC and OD for identification in evidence.

Mr. Wilson: No objection to OC, your Honor.

The Court: It may be admitted.

Mr. Wilson: No objection to OD. [133]

The Court: It may be admitted.

Q. Now, Mr. Moseley, you have testified that in connection with the bar you also operated a lunch counter.

A. Beg pardon?

Q. I believe you testified that in connection with the operation of the premises, especially the bar, you operated a lunch counter? A. We did.

Q. What did you sell at that lunch counter?

A. Well, we used that more for parties than we did—we didn't have any—what I mean, we didn't operate it all the time.

Q. When you did operate it, what did you sell?

A. Well, sold everything in the lunch line.

Q. What?

A. Well, you know, for lunches.

Q. Well, did you sell hot foods?

A. Hot dogs, hot soups, anything you get at a lunch counter.

Q. You sold hot dogs? A. That's right.

Q. Where did you keep the commodities?

A. Kept those in the cooler.

(Testimony of Ross Fred Moseley.)

Q. In the bar room? A. In the bar room.

Q. Did you have ice in the bar room?

A. Well, at times. [134]

Q. Did you use ice at all in the making of mixed drinks? A. That's right.

Q. Where did you get your ice from?

A. Twin Falls, Idaho.

Q. How far is Twin Falls from Contact?

A. About sixty-five miles.

Q. And the ice company came from Twin Falls to Contact to deliver you ice? A. No, sir.

Q. Did you go get it?

A. Sometimes. We would get it various ways; anyway we could get it.

Q. Where did you store that?

A. Well, we had it stored in an ice box, a wooden box.

Q. Where was that? A. Behind the bar.

Q. How much ice would you buy?

A. About two hundred pounds.

Q. And you kept that in an open wooden box behind the bar? A. A portion of it.

Q. As manager, did you make current quarterly reports to the Nevada Tax Commission of all of your receipts from the slot machines and gambling?

A. Personally I never did.

Q. You never did? [135] A. No.

Q. You have designated one of the buildings as the oil house? A. That's right.

Q. What did you store in the oil house?

A. Motor oil, kerosene, lamp gas, empty bottles.

(Testimony by Ross Fred Moseley.)

Q. When the refrigerator was in operation, did you keep the kerosene that was needed to operate that refrigerator in this oil house?

A. We didn't operate the refrigerator.

Q. Wasn't the refrigerator ever operated while you were there?

A. It was, yes, while I was there.

Q. Well, when it was operated, did you keep the kerosene in that oil house?

A. That is where we kept the kerosene, in that building.

Q. Did you ever use that refrigerator to manufacture ice at any time?

A. It has been used, yes.

Q. While you were there? A. That's right.

Mr. Puccinelli: That is all, thank you, Mr. Moseley.

Cross-Examination

By Mr. Platt:

Q. Mr. Moseley, have you any knowledge about the construction of the gasoline pumps that were immediately in front of the premises here? If you have, say so and if you have not, say so. [136]

A. Do I have knowledge of them?

Q. Yes, have you any knowledge of the structure or construction of the two pumps?

A. Previous to the fire?

Q. Yes.

A. I have a knowledge of them, yes.

Q. Well, do you know whether or not they were

(Testimony by Ross Fred Moseley.)

operated by independent motors within the pumps?

A. They were. Each pump had a motor.

Q. You are sure of that, aren't you?

A. Well, I am positive.

Q. The reason I am asking the question is that I gather from one of your answers that possibly they were operated by the electrical system that permeated the building, but you now tell me that you have knowledge that these gasoline pumps were operated by an independent motor and that is a fact?

A. Yes, each pump had a motor.

Q. That motor was within each pump?

A. That's right.

Q. And covered up and concealed?

A. That's right.

Mr. Platt: That is all.

Redirect Examination

By Mr. Parry:

Q. Were those motors connected to this electrical system that, [137] to use Mr. Platt's words, permeated the building?

A. They were connected with the power plant.

Q. That is what made the motors run?

A. That is right.

Q. Where was the switch that controlled the electricity going out to the motors?

A. Inside the motors.

Q. Did you keep that switch turned on or off?

A. We always kept that switch off.

Q. Why did you do that?

(Testimony by Ross Fred Moseley.)

A. Well, somebody might come up there and help themselves to gasoline. It was the custom of the place.

Q. And was there a switch controlling the lights under the canopy? A. That's right.

Q. Where was that switch?

A. That was in the bar room.

Q. And at noon on May 3rd were those lights on or off? A. They were off at noon time.

Q. And they were turned on by the switch in the bar room, is that correct?

A. That's right.

Q. There was some mention made yesterday of money being at various places. After the fire were you able to get in and see whether there was any melted silver, etc., of it? [138]

A. I imagine we did.

Q. How long was it before you could get in and find that melted silver?

A. Oh, some was recovered possibly the next day, but it was a week or more before we recovered what was in the basement.

Q. How long did that debris stay hot there?

A. Quite a while.

Q. Well—— A. A week or ten days.

Q. Did it keep on smoldering? A. Yes.

Q. So the next day after the fire and days after that, were there any subsequent explosions there?

A. Yes. It was pretty dangerous around there. A lot of stock of liquor in the basement and that burned for several days, kept smoldering, was dan-

(Testimony by Ross Fred Moseley.)

gerous. You might get hit with a broken bottle.

Q. The bottles exploded?

A. That's right. That is one reason we weren't around the basement for several days.

Q. Now then this trailer house that has been mentioned. Who owned the trailer house?

A. Mr. Herzinger.

Q. Was it destroyed? A. It was. [139]

Q. How soon did it catch fire during this conflagration that went on there, do you know?

A. Well, the building was down, of course, the heat was intense.

Q. How soon did the trailer catch fire?

A. Well, it was my recollection the building had fell down before the trailer started to burn.

Q. And then it caught fire? A. Yes.

Q. How much of it was consumed?

A. It was all consumed.

Q. How far is the power plant over north of what you call the pump house, how much distance was that there? A. About 300 feet.

Q. In other words, it was farther away than shows on the blackboard? A. That's right.

Q. Did the power plant catch fire or burn?

A. No.

Q. Mention has been made that Mr. Klitz did some work there on the electrical system. What part did he work on?

A. Well, he worked on the power plant. I don't know whether he worked on the line system or not.

Q. You do know he worked on the power plant?

(Testimony by Ross Fred Moseley.)

A. Yes. [140]

Q. Did you ever know of this man Mr. Harmer working around there?

A. Not to my knowledge.

Q. Did he work there while you were there?

A. Not to my knowledge.

Q. Did you ever pay him for working there?

A. Never did.

Q. Did you ever know of Mr. Herzinger paying him? A. I don't know.

Q. Some question was asked whether Mr. Klitz's car was under the canopy. Was any part of Mr. Klitz's car under the canopy at the time of the fire?

A. To my recollection it was not.

Q. Where did you place it in front of those buildings?

A. Well, my best recollection is in front of the cabin.

Q. That is the cabin between the grocery store and the oil house? A. That's right.

Q. When this fire occurred, what did you first notice? A. The flash.

Q. Was that flash reflected in the building any?

A. Yes.

Q. As you were standing there behind the bar were you looking toward Mr. Nielson?

A. Well, yes. [141]

Q. And what did you see him do there on the stool? A. Well, I seen him jump.

Q. Was there any sound accompanying the flash?

A. Well, I didn't hear a sound.

(Testimony by Ross Fred Moseley.)

Q. What did Mr. Nielson do, which way did he turn?
A. He turned directly around.

Q. Toward you or away from you?

A. Toward me.

Q. Did you see his face?
A. Yes.

Q. What kind of expression did he have on his face?

A. Well, I call it a surprised expression.

Q. Did he walk to the door or run?

A. He ran.

Q. When did you first work there at the Springs?
I was a little confused on that.

A. Well, the first work I done for Mr. Herzinger was in March after he bought the place.

Q. March of what year?

A. That would be '46.

Q. And you had gone there originally when for Mr. Brown?

A. Well, I had been there with Mr. Brown since December before the fire, previous to it.

Q. I believe there is some testimony you went there in December, 1946, on cross-examination. If I have it correct, you went [142] to the place then in December, '45, is that right?

A. That is my first.

Q. And you started working for Mr. Herzinger when now?
A. Some time in March, '46.

Q. Now when Mr. Herzinger came there to take the money to bank, did he take all the money you had?
A. No.

Q. Considerable questions were asked you about

(Testimony by Ross Fred Moseley.)

this slot box money. Would he leave money in that slot box when he took money to the bank?

A. Sure.

Q. About how much would he leave with you when he went to the bank?

A. Well, that would vary, around \$600 to a thousand dollars.

Q. When he took money out to go to the bank, how much would he leave?

A. Six hundred to a thousand, because he didn't bank every week.

Q. But when he did take it out of there to go to the bank, how much was he accustomed to leave?

A. Well, it would vary, from six hundred to a thousand.

Q. What was the purpose of that money?

A. Well, that was for the slot machines.

Q. Did you do sort of a general banking business for that community around there? [143]

A. Yes, we had to. We had to keep a lot of money around there in order to take care of these pensions and pay checks.

Q. Do you remember how long it had been before Mr. Herzinger had taken money to the bank prior to the fire? A. It had been past a week.

Q. More than a week?

A. That particular week end he was in Nevada or some place and he hadn't made his trip back yet.

Q. After the fire, when you went down there, did you find where the cash register from the grocery store and gas station had fallen, after the fire?

(Testimony by Ross Fred Moseley.)

A. Yes, we found it.

Q. Where was that register, the one out of the grocery store?

A. It was laying right in what had been part of the grocery store. There was no basement under the grocery store.

Q. What was the condition of the silver that had been in it?

A. Well, the silver dollars wasn't all destroyed. All the rest of the silver was pretty much run together, stuck together.

Q. Who assisted you in salvaging that burned silver? A. Mr. Herzinger.

Q. You and he picked up this melted silver there?

A. That's right.

Q. About how many of the silver dollars could you salvage and use over?

A. Well, I imagine, by my recollection, about twenty-five. [144]

Q. Did you find the register that had been in the bar? A. Yes.

Q. And there was some melted silver in that?

A. That's right.

Q. Do you know if Mr. Herzinger picked that up? A. Yes.

Q. And were there any silver dollars salvaged out of that register?

A. Well, just about the same amount, I imagine. I don't recall the amount.

Q. Was the remainder of it melted?

A. Well, it was stuck together.

(Testimony by Ross Fred Moseley.)

Q. Did you find the cash register from the lunch room?
A. Well, we found where it had been.

Q. What did you find with reference to it?

A. Well, we found a little silver.

Q. What condition was that silver in?

A. Well, just the same as the other.

Q. Did you find where the slot machines had fallen into the basement?
A. That's right.

Q. What happened to the money in the slot machines?
A. It was pretty well melted.

Q. Did you pick it up?

A. We salvaged the, you would call it bullion, I suppose. [145]

Q. Did you find the box that you had under the crap table?
A. Yes.

Q. What was the condition of that?

A. That was down the basement. That was just a mass of silver.

Q. What happened to the bills that had been in there, the currency?

A. I don't know. Couldn't find them.

Q. Did you find the box that had the slot machine money in it?
A. Yes.

Q. What was the condition of that box?

A. That was the same as the other box, all melted and stuck together.

Q. And you and Mr. Herzinger salvaged all the silver you could get out of there?

A. That's right.

(Testimony by Ross Fred Moseley.)

Q. Did Mr. Herzinger take it away or did you take it away? A. Mr. Herzinger.

Q. He is the man that knows about that. Now on this particular day when Mr. Nielson came up, do you know how long it had been since gas had been delivered?

A. Well, not exactly at that time. We get gas about every five days.

Q. How long had it been, as far as you know, since he had been up there to deliver gas?

A. Well, made a trip just about regular. [146]

Q. Some questions were asked yesterday about efforts to put the fire out. How soon were all the buildings a mass of flames there after the fire?

A. Just a matter of minutes.

Mr. Parry: I think that is all.

Re-Cross-Examination

By Mr. Puccinelli:

Q. You said that the debris, the remains of the fire, smoldered for ten days?

A. Oh, yes, there was fire in there ten days.

Q. Do you recall Mr. Odermatt coming to the Hot Springs the same day of the fire?

A. Yes, sir.

Q. Do you recall Mr. Warner coming there the next day? A. Well, I believe I do.

Q. Do you recall their making an examination of the premises and what remained, that is, going right through the premises and checking them?

A. That I did?

(Testimony by Ross Fred Moseley.)

Q. No, that they did. Do you recall their doing that?

A. No. I know they were on the premises. I don't recall their doing any checking.

Q. I believe you stated that to the best of your recollection the fire in the bar, that is, the general premises, was first and you watched that burn and then you saw the building cave [147] in and then you saw the trailer house on fire, is that right?

A. Yes.

Q. Where were you when you observed all this?

A. When I saw the trailer house on fire?

Q. Yes, when you saw the building fall in and the trailer house being destroyed, where were you?

A. I was on the premises, just far enough away so I wouldn't get burned.

Q. With reference to direction, were you south across the highway, west, north, or east?

A. Well, I was all around the place.

Q. Were you up on the hill to the west?

A. No, sir.

Q. Did you ever go over through the hills to the south? A. No, sir.

Q. Over the hills to the east? A. No.

Q. How close were you to the premises, to the actual burning? A. As close as I could get.

Q. You stayed as close as you could get?

A. Yes, for comfort.

Q. As I remember your testimony on direct examination and on cross, you stated the time you first noted the fire you were behind the cigar counter,

(Testimony by Ross Fred Moseley.)

which is in the upper left-hand corner of the bar room where you have designated with the [148] letter "x," is that correct? A. That's right.

Q. Mr. Nielson was seated in the middle of the bar room? A. That's right.

Q. You heard no noise. You saw just the flash?

A. Saw the flash.

Q. And then the length of time that it took you to leave your position behind the cigar counter and go out the door, as you said, in a hurry?

A. That's right.

Q. The entire premises were enveloped in a flame?

A. The front part was all flame when we went out.

Q. In other words, the entire front——

A. That's right.

Q. (continuing): ——of these premises, including the front of the bar? A. That's right.

Q. Now, Mr. Moseley, I may have misunderstood you, both yesterday and today. You were actually then at Hot Springs about 18 months before this fire took place, weren't you, instead of six months?

A. Well, yes. I established my residence there in '45, in December.

Q. So that you had been more or less familiar with the premises and in contact with all of the equipment and everything [149] else for 18 months actually before May 3rd of 1947? A. Yes.

Q. There was another thing. How many cash registers were actually on that place?

(Testimony of Ross Fred Moseley.)

A. There were three in operation.

Q. You had a cash register in the grocery store?

A. That's right.

Q. A cash register in the bar room that was used in connection with the bar? A. That's right.

Q. And you had a cash register in the lunch counter? A. That's right.

Q. During the course of the conversation yesterday, during the course of your examination yesterday, you gave testimony to the effect that there were \$300 in the bar register? A. Yes, sir.

Q. Now which cash register is that, the one used in connection with the bar or in connection with the lunch counter?

A. That was the bar register.

Q. Did you have any money in the one in the lunch counter? A. Yes, sir.

Q. How much money did you have in there?

A. My recollection was \$75 in there.

Q. And \$75 in the one which was in the grocery store? A. About three hundred. [150]

Q. Three cash registers—one located in the grocery store? A. That's right.

Q. That contained \$300? A. That's right.

Q. One in the bar containing \$300?

A. That's right.

Q. One in connection with the lunch counter containing \$75? A. That's right.

Q. Mr. Moseley, isn't it a fact that yesterday, both on direct and on cross-examination, you testified that as of the date of the fire you had \$300 in

(Testimony of Ross Fred Moseley.)

the cash register that was in the bar room, you had \$75 in the cash register which was in the grocery store? A. That was an error.

Q. Were you in error then?

A. That's right.

Q. Then what is your correct testimony?

A. It was \$300 in the grocery store, \$300 in the bar, and \$75 in the lunch counter.

Q. So that in the three cash registers on those premises you had \$675? A. That's right.

Q. And then in addition to that you had \$800 in another container which you used in connection with the crap table? A. That's right. [151]

Q. Describe that container?

A. It was a tin box, what we call cash box.

Q. How large was it?

A. Well, it was about the size of these boxes used for fishing equipment, I would say 18 inches long, 8 inches wide and 8 inches deep.

Q. I believe you yesterday testified the money was half in currency and half in silver?

A. That is about right.

Q. Did you have \$400 in silver in the box that size? A. In what box?

Q. In that box you just described as the one for carrying fishing tackle? A. Yes.

Q. Four hundred dollars in silver and four hundred dollars in currency in that size box?

A. I would say we had more than four hundred in currency.

(Testimony of Ross Fred Moseley.)

Q. Yesterday your testimony was it was half and half. A. It could be.

Q. What would that weigh, Mr. Moseley, would you say? A. Well, I couldn't tell you.

Q. Your best estimate? I have never had \$400 to carry. A. It takes 15 or 16 to the pound.

Q. Sixteen dollars to a pound, is that right?

A. Well, I presume. [152]

Q. Well then, based on your knowledge of that fact, I would like to have you state to me, taking into consideration the silver and the currency which was in the box, how much did that weigh, your best estimate?

A. Well, it would be a guess, unless I stopped to figure it up.

Q. Well, your best guess?

A. Well, I carried that box over every morning. I know it wasn't so heavy I couldn't carry it.

Q. Well, how heavy would you say?

A. Well, I say fifty or sixty pounds.

Q. So we have the one in which you kept the crap table money weighing fifty or sixty pounds, right? A. Yes.

Q. Then there was a like box in which you stated yesterday that you had a thousand dollars?

A. Yes, sir.

Q. Half in currency and half in silver?

A. Yes, sir.

Q. Describe that box.

A. Well, that run in denominations, nickels, dimes, quarters, half dollars.

(Testimony of Ross Fred Moseley.)

Q. Describe the box to me.

A. Oh, it was the same style of box as I described before.

Q. The fishing tackle type of box? [153]

A. Yes.

Q. And in that you had \$500 in silver and the balance in currency? A. No.

Q. Isn't it a fact yesterday you testified that \$500 was made up half currency and silver?

A. That is the slot box.

Q. So at least you had a considerable amount of silver in there? A. That's right.

Q. What did that weigh, in your best estimation?

A. Well, around fifty to sixty pounds.

Q. That makes from one hundred to one hundred twenty? A. I didn't weight it.

Q. In addition to that we have \$675 which was contained in the cash register in the grocery store and in the bar and at the lunch counter, is that right? A. That's right.

Q. Was that silver or currency?

A. That was both silver and currency.

Q. About half and half?

A. Well, that is the way is usually runs.

Q. What did you store that in at the end of the day's business?

A. Well, we have what we call a cash box for the register.

Q. And did you put all this money in the cash box? [154]

(Testimony of Ross Fred Moseley.)

A. The register cash box, that was at the end of the day.

Q. Describe that box to me.

A. Same style box.

Q. Fishing tackle style box? A. Yes.

Q. What did that box weigh when you had all this money in it, to your best estimate?

A. Well, I never weighed that. That amount of silver probably would run around 20 pounds, twenty-five.

Q. Six hundred seventy-five dollars?

A. Well, half of it would be currency.

Q. Say three hundred?

A. Well, let us make it fifty pounds.

Q. Now every morning you took 150 pounds worth of money and carried it from where you lived to that bar?

A. I didn't carry it, took it in my car.

Q. In other words, your regular practice in the morning was to take these boxes, put them in your car, and drive there and unload and put them away?

A. That's right.

Q. You don't have police protection there, do you? A. No.

Q. And yet you kept that quantity of money on those premises?

Mr. Parry: I object to that as argumentative.

Mr. Puccinelli: I think it is proper. [155]

The Court: Maybe it is argumentative. You might ask him whether or not he had police protection.

(Testimony of Ross Fred Moseley.)

Q. Did you have police protection?

A. Well, not right at the premises. Mr. Hardy was the constable up at Contact.

Q. I repeat my question. Despite the fact that Mr. Hardy was there, did you have police protection?

A. Did we have police protection?

Q. Yes. A. No, not to my knowledge.

Mr. Puccinelli: That's all.

Mr. Parry: I think that is all, your Honor.

Mr. Daly: The next witness is a little out of order, but it is necessary he return as soon as he can to Elko. Call Mr. Knapp.

DALTON KNAPP

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Daly:

Q. Will you state your full name please?

A. Dalton Knapp.

Q. Where do you live, Mr. Knapp?

A. Elko.

Q. What is your business?

A. Building contractor. [156]

Q. Are you associated with a firm there?

A. Yes, Knapp Brothers.

Q. How long have you been engaged as a building contractor?

A. Since 1945.

Q. Are you acquainted with Mr. Herzinger?

(Testimony of Dalton Knapp.)

A. Yes.

Q. The man sitting right behind here?

A. Yes.

Q. How did you happen to become acquainted with him?

A. Well, after the fire he came to my home and asked me to prepare estimates on the damage done to the property there at Contact.

Q. Were you familiar with this property?

A. I had never been to the site before.

Q. You didn't examine it before the fire?

A. No.

Q. Did you make some calculations as to the cost of rebuilding those buildings that were destroyed? A. Yes.

Q. And what information did you have as to those buildings when you made your calculations?

A. Mr. Herzinger supplied me with notes giving the construction of each building and I went from that. That is all the information I had, no photographs or anything to go by.

Q. Generally what type of construction was that, as far as [157] being expensive or cheap construction? A. It was very cheap construction.

Mr. Puccinelli: Objected to on the ground it is hearsay.

The Court: The answer may go out and objection is sustained.

Q. Did you make notes of your calculations at that time?

A. Well, I just had—I didn't keep any notes on

(Testimony of Dalton Knapp.)

it. It was so long ago I destroyed all the notes, but I do have the estimate to show that I prepared the estimates from.

Q. Do you know when this was?

A. Well, it was early in 1947. I don't recall the exact date. I think it was around June. I think my estimate shows June 4, 1947, when I made out the estimate.

Q. What type of construction did you estimate?

A. Well, it was mostly frame. In fact, all of it was frame construction, the cheapest type.

Q. Do you have your estimate to show and whatever notes you have with you?

A. Yes, I do.

Q. By looking at those, can you tell us what you estimated the cost of reconstructing a building, as you put it, of the cheapest type of construction, which is about dimensions 24 by 60?

A. Six thousand six hundred twenty-four dollars. [158]

Q. Does that include any plumbing?

A. That included just the notes supplied me.

Q. Can you refer to this and see if there was any plumbing in there?

A. No, it included no plumbing.

Q. Can you tell us what your estimate was for the cost of reconstructing the cheapest type of construction, a building 16 by 24?

A. Two thousand four hundred eighty-one dollars.

(Testimony of Dalton Knapp.)

Q. And then in addition to this building you last mentioned, a building 8 by 24?

A. Four hundred thirty-one dollars.

Q. And a building 12 by 12?

A. Seven hundred ninety-four dollars.

Q. And a building 14 by 24?

A. One thousand six hundred ninety-three dollars.

Q. And a building 10 by 10?

A. Two hundred eighty-seven dollars.

Q. And a canopy 16 by 16?

A. Two hundred thirty dollars.

Q. And based upon your experience, Mr. Knapp, would you say that those were reasonable figures for that type of construction at that time?

A. I would say they were very reasonable.

Q. Can you tell by looking at your notes, Mr. Knapp, whether [159] or not that included any electrical wiring, any electrical work?

A. Yes, it included electrical wiring.

Mr. Daly: That is all, Mr. Knapp, thank you.

Cross-Examination

By Mr. Vargas:

Q. May I see the document to which you are referring in connection with your testimony, Mr. Knapp?

A. Those are the notes supplied me. I based my estimate on it.

Q. These are your own notes?

A. No, those are Mr. Herzinger's.

(Testimony of Dalton Knapp.)

Q. What estimated cost per square foot did you use in determining these figures?

A. Well, I never ran an estimate on it on that basis. I actually figured the cheapest way, but in checking over they all check out pretty close, as far as the cost.

Q. Well, what does that estimate check out, cost per square foot?

A. I imagine it would run between four and five dollars.

Q. Now you say this 10 by 10 building, we had an estimate there of \$287? A. That's right.

Q. So that would be \$2.87?

A. Well, that is a different type building. It didn't have any finish work or anything. You would have to check over the notes and determine just what is included in that. The buildings [160] all are finished different. If the buildings were all the same construction, it would probably check out fairly close, but the buildings are not finished up the same and naturally wouldn't cost the same.

Q. As I understand your testimony, you say you had no plans or specifications of the buildings that previously existed? A. That is right.

Q. You had no blueprints? A. No.

Q. So your entire testimony then is predicated solely alone and only upon what Mr. Herzinger, the plaintiff in this case, told you?

A. That is right.

Mr. Vargas: That's all.

(Testimony of Dalton Knapp.)

Re-Direct Examination

By Mr. Daly:

Q. Just one question, Mr. Knapp. I wonder if I might have the notes Mr. Vargas is referring to and have them stapled together and marked, I believe it is Exhibit No. 7. That is all, Mr. Knapp, thank you.

WILLIAM A. KLITZ

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name please?

A. William A. Klitz. [161]

Q. Where do you live, Mr. Klitz?

A. Contact, Nevada.

Q. How long have you lived there?

A. Oh, approximately 12 years.

Q. How old are you? A. Twenty-nine.

Q. What is your business or occupation?

A. I am a mechanic.

Q. Where have you practiced the profession of mechanic? A. At Contact.

Q. How do you do it there?

A. Well, by doing different mechanical work on automobiles.

Q. Do you have your own place of business?

A. I have a small shop, yes.

Q. And you work for yourself?

(Testimony of William A. Klitz.)

A. That's right.

Q. How long have you conducted such work there at Contact?

A. Well, I have worked there off and on since I got out of the army, which was December, '45.

Q. You have been there rather continuously since then? A. Yes.

Q. Do you live there in the town of Contact?

A. Yes.

Q. Do you know this place called Mineral Hot Springs? A. Yes. [162]

Q. How long have you known that?

A. Well, I would say mostly since December of '45.

Q. There has been a place of business there since that time? A. Yes.

Q. Has that always been a place of business there during the 12 years you have lived around Contact?

A. Well, yes. Of course, it has been built up.

Q. You have been down to the Mineral Hot baths at times? A. Yes.

Q. Did you patronize this business that operated there in May of 1947? A. Yes.

Q. What were you accustomed to buy there?

A. Well, I bought my groceries there and a bottle of beer there too, I guess, when I thought I needed some.

Q. Was that the place where you were accustomed to buy most of your grocery supply?

A. Yes.

(Testimony of William A. Klitz.)

Q. Do you know Mr. Moseley? A. Yes.

Q. How long have you known him?

A. Why, approximately a year.

Q. Do you know Mr. Herzinger? A. Yes.

Q. On this particular day they had the fire, about what time [163] did you go there, do you know?

A. Well, I should judge around eleven o'clock.

Q. What was the purpose of your going there?

A. Well, I don't remember exactly. It seems as though I had gone there to get some motor grease.

Q. Had you ever paid any attention to that picture machine that was there in the place?

A. No. That is, I had played the machine, but I made no repairs.

Q. You had not made any repairs? A. No.

Q. What, in general, was the nature of the machine? What did it do?

A. Well, it was a coin-operated machine. After a coin was inserted it would show a movie and played music at the same time.

Q. Where was the movie shown?

A. Well, it was shown on the screen right at the machine.

Q. About how large was that screen?

A. Oh, I would say probably two by two.

Q. What was the approximate size of the whole machine, how high and how wide and how long?

A. Well, I would say probably four feet wide.

(Testimony of William A. Klitz.)

It was a rather tall affair, I would say, four feet and the width would be, I would say, four feet wide. [164]

Q. It would be about 4 feet by 4 feet by 6 feet?

A. I would say 4 feet thick.

Q. Then would be about 4 by 4 by 6 feet tall?

A. Approximately.

Q. Of what was it constructed, wood or metal?

A. Well, the case, the cabinet, as I remember, part of it was wood.

Q. And before this day had you ever looked inside of it? A. No.

Q. Where were you in the place when Mr. Nielson drove up or when you first saw him?

A. I was in the bar.

Q. What part of the bar, do you remember?

A. Well, no, I don't remember exactly. I was probably there sitting at the bar near the door.

Q. Had you driven there in car? A. Yes.

Q. I wonder if you would step down to this blackboard and familiarize yourself with the plat here where we have shown the bar room, grocery store, occupied cabin, oil house, etc. Will you take a piece of chalk and indicate by a rectangle about where you parked your car when you came in that day?

A. My car was sitting right here, right approximately in front of this oil house.

Q. Put a "K" on there. Which direction was your car headed [165] when you stopped?

A. North.

(Testimony of William A. Klitz.)

Q. You had driven in from the south from Contact?
A. That's right.

Q. What kind of a car was it?

A. '31 Model A pick-up.

Q. Did you have to crank it?

A. No, it has a regular starter, just the same as any other automobile.

Q. Was the starter operating that day?

A. Yes.

Q. And then at the time you first were aware of Mr. Nielson being around there, you were sitting in the bar there on the south side of the bar room?

A. Well, I was in the bar room. I don't know my exact position.

Q. Where did you first see Mr. Nielson or his truck?
A. I first saw him as he drove in.

Q. The motion attracted your attention?

A. Yes.

Q. Where did he drive first, if you know?

A. Well, right in front of the grocery store, in front of the tank.

Q. What did he do then after he drove in?

A. Well, he proceeded to pump some gas in it. [166]

Q. Did he go into the bar room then?

A. Yes.

Q. After how long a length of time?

A. Well, I don't know exactly. I wasn't watching him real close. I couldn't make an exact statement as to the time.

Q. After a few minutes was it?

(Testimony of William A. Klitz.)

A. Yes, I would say a few minutes.

Q. What did he do when he came in the bar room then? A. Why he got a bottle of pop.

Q. Now then did you see him later go out?

A. Yes. He went out to move his truck over to the tank.

Q. Where was that tank?

A. It was located between the two pumps.

Q. Did you see where he moved it?

A. No, I didn't.

Q. Were you aware of the motion of the truck out there?

A. Well, yes. I don't know as I exactly saw him move it, but the first time I saw it was in front of the grocery store and later I saw it over on the other side of the pump, so it must have been moved.

Q. Did he come back in the bar again?

A. Yes.

Q. What did he do when he came back?

A. He played that moving picture machine.

Q. Did you see him put some coins in it? [167]

A. Yes.

Q. Did you observe whether he put one or more in? A. Well, I wouldn't say. Several.

Q. Where were you when he put the coins there? A. I was seated there along the bar.

Q. And where did Mr. Nielson seat himself?

A. Well, he was on a stool, would be somewhere approximately near the middle or center of the building, probably twenty feet back from the machine.

(Testimony of William A. Klitz.)

Q. You would place him about 20 feet back from the machine? A. Approximately.

Q. Now then did you go over to this picture machine any time? A. Yes.

Q. Within what period of time after it started did you go over there?

A. Well, as I remember, it showed one complete picture and it started on the second one when this flicker appeared in the picture.

Q. What did you do then?

A. Well, there is an inspection door on the side of this movie machine and I went over and looked inside to see what was causing the flicker.

Q. Is that inspection door on the north or south side? A. Well, it was on the north side.

Q. I wonder if you would step down again to the map and let [168] us see just where that door was that you told us about. Take the chalk and draw the door in there.

A. The door was on this side, right here, be approximately here, from here back.

Q. Now when the door was opened, where were the hinges, toward the front of the building?

A. The hinges were right here when the door was open. The door turned back this way.

Q. When you got back there that machine was operating? A. Yes.

Q. What was the source of the light for the machine, do you know?

A. Well, it has a regular projector bulb in there.

Q. Is that an incandescent bulb? A. Yes.

(Testimony of William A. Klitz.)

Q. Is there a motor in there? A. Yes.

Q. When you opened the door, what did you do?

A. Well, I didn't actually do anything to the machine. I just looked through the door to determine the cause of the flickering on the screen.

Q. Could you see any cause?

A. Well, the trouble was just the fact that the film had gotten off the track.

Q. That is a regular photographic film such as run in these [169] home movies?

A. That's right.

Q. Did you put it back on the track?

A. No, I didn't.

Q. How was it operating then when you were there?

A. Well, it was operating. You see the only trouble was just this flicker on the screen. You could still see the picture but it was just rather annoying for the picture to be jumping there.

Q. Was there music playing? A. Yes.

Q. Does that machine have what we call a loud speaker? A. Yes, it had four loud speakers.

Q. What kind of music was playing, orchestra or singing?

A. Well, it was an orchestra at the time.

Q. Did you stand there watching the machine?

A. Yes.

Q. Did you watch this film? A. Yes.

Q. What did you see as you watched it there? What did the machine do?

A. Well, you mean the operation of the machine?

(Testimony of William A. Klitz.)

Q. Yes, how was it operating?

A. Well, the film, you see, it is an endless film and just keeps feeding through the projector. [170]

Q. Was it doing that properly while you were there? A. Yes, sir.

Q. Now then at that time you were back at the machine and Mr. Nielson was sitting on the stool and did you happen to observe where Mr. Moseley was?

A. You mean before I went to the machine?

Q. Well, at or about the time or when you last noticed him. A. Well, not exactly, no.

Q. Was there any one else in the bar room there, do you know?

A. There was Mr. Moseley and myself and Mr. Nielson.

Q. And any one else?

A. No, not that I remember.

Q. Then what did you first observe about this fire?

A. Well, I decided just let the machine go until we finished that picture and then shut it off. So I pulled my head out to see what everybody else was doing.

Q. Had you had your head in the machine?

A. Well, not actually in the machine, but the front of the building was blocked, due to the fact that the door opened toward the front.

Q. Did you lean over partly toward the machine?

A. Yes.

(Testimony of William A. Klitz.)

Q. You pulled back and what did you see?

A. I looked toward the front of the building and saw fire in front of the building. [171]

Q. Was anybody else in the building?

A. No, everybody else had gone and I was the last one out of the building.

Q. Was there any fire around the machine at that time? A. No.

Q. Was there any here in the bar room?

A. No.

Q. Was there any fire out in front?

A. Yes.

Q. Did you go out through that front door?

A. Yes.

Q. Was there any fire in the grocery store at that time? A. No, no fire in the grocery store.

Q. As you went out through the front door did you get burned? A. No, I didn't.

Q. Did you have a coat on?

A. No, I don't think I did that day.

Q. What kind of a day was it, do you know?

A. It was a hot day.

Q. After you went out through the front door there, what did you see?

A. Well, I saw this fire out there in front.

Q. Where was the fire as you saw it then?

A. Well, the fire was every place out there in front, across the whole front, all of the building. [172]

Q. At what speed did you go out after you saw the fire?

(Testimony of William A. Klitz.)

A. As fast as my legs would carry me.

Q. After you got outside the door, then what did you do?

A. Well, the first thing I saw that the fire had gotten such a start there was no point in trying to put it out. We didn't have any water to fight it with, so my first thought after that was to get my car out of there.

Q. Will you step down to the plat please and take this pointer and show what path you followed?

A. I came out this door and decided to get the car and came back around this building and around here back this way to the car, got in the car and started it and drove down here.

Q. You drove down sort of southerly, down the hill between the oil house and pump house?

A. Yes.

Q. When you got around to your car, did you see fire there then? A. Yes, there was.

Q. Point where that was.

A. When I got back around here where the fire was, the flames were coming over the car. In fact, it was so hot I couldn't walk right by it. I had to shield my face and arms to get up to my car.

Q. Did you run around the building?

A. Yes, I ran. [173]

Q. At any time there after you went out the front door, did you see what Mr. Nielson did at the truck?

A. Well, I didn't actually see Mr. Nielson when he drove the truck away.

(Testimony of William A. Klitz.)

Q. Did you see the truck leave or hear it?

A. No. You see, he probably moved his truck——

Mr. Puccinelli: That is objected to as not responsive.

The Court: Just testify as to your own knowledge.

Q. When you got around to your car, was his truck there?

A. No, he moved it down there where I did.

Q. Did you talk to Mr. Nielson any after the accident?

A. Well, we talked some, yes, after the accident, but I don't remember any of the conversation.

Q. Was he burned, do you know?

A. Yes, Mr. Nielsen was burned.

Q. Were you one of the party that took him down to Contact? A. No.

Q. You stayed there at the Mineral Hot Springs then? A. Yes.

Q. Some questions have been asked on cross-examination about what attempt was made to put the fire out. Was there any attempt made to put it out, as you saw?

A. Actually there was nothing we could do. There was too much fire for us to fight. We had no water to fight it with and no way to fight it, so really there was nothing we could [174] do to try to control the fire.

Q. Did you make any attempt to get anything out of the buildings or salvage anything?

(Testimony of William A. Klitz.)

A. I didn't think it was worth while. At one time we could have gotten in the back door to the bar, but were taking chances on getting out.

Q. As you judged the situation at that time, it did not seem advisable to get anything out?

A. That's right.

Q. Were you aware there was gasoline and oil and other substances around there, in and around the buildings? A. Yes.

Q. And as you ran out the door, was there fire on that canopy?

A. As I stated before the fire was all around the front of the building. That would include the canopy, near the pumps and in front of the bar.

Q. Now then as you stood there by that picture machine, were there any sparks or flame or anything of that sort?

A. No. As a matter of fact, when I left the bar the picture machine was still operating.

Q. The music was still playing?

A. Music was still playing.

Q. Did you see any fire start in that neighborhood at all? A. There was no fire there.

Q. As I understood you, there was no fire inside the building [175] at all? A. That's right.

Q. Now then, after the fire did you observe that filler pipe out there between the two pumps on the west side of the canopy? A. Yes.

Q. Was it closed or open?

A. It was open.

Q. And was there anything in it?

(Testimony of William A. Klitz.)

A. Yes, the nozzle used by the delivery truck. Nozzle and remains of the hose were there.

Q. There was the nozzle in the filler pipe?

A. Yes.

Q. And what was left of the hose?

A. Well, the only thing that was left of the hose was just the wire put inside the hose to keep it from collapsing.

Q. Where was that left with reference to that filler pipe? A. The hose?

Q. Yes.

A. I would say just back from the filler pipe.

Q. To the west?

A. Yes, it would be to the west.

Q. Was any one else with you when you noticed that nozzle wire there?

A. Well, I don't remember of anybody.

Q. Did people come around there after the fire started? [176] A. Yes.

Q. Do you recall who was the first ones that got there after the fire that you saw?

A. Well, some people from San Juacinto were the first ones.

Q. How did they arrive, if you know?

A. Well, they came in cars and conveyances to get up there.

Q. Do you now recall any names of any of them that came in that first bunch?

A. Well, I remember seeing Mr. Zilliox and Mr. Wore. Mr. Wore didn't come from San Juacinto.

Q. Where did he come from?

(Testimony of William A. Klitz.)

A. From a little ranch east called the tin mine, approximately a half mile.

Q. Did you see the trailer house burn?

A. Well, yes, I saw it burn.

Q. Did you observe how soon it caught fire after the buildings were on fire?

A. Well, it wasn't long.

Q. Was there much heat around that fire?

A. Yes, there was lots of heat. There was enough heat that you couldn't get anywhere near the fire.

Q. And that day before the fire, what kind of a day was it, just the temperature?

A. The day before the fire?

Q. No, that day on which the fire happened. [177]

A. It was a hot day.

Q. Have you any idea how hot?

A. Well, it would just be an estimate, but I would say around 90 degrees.

Q. Have you driven the road between Contact and Wells a great many times? A. Yes.

Q. Are there hills or curves on that road?

A. Yes.

Q. Do you know how high the highest altitude is that you go over coming from Wells up to Contact? A. Not exactly.

Q. Approximately, do you?

A. Well, I would say around six thousand.

Q. There are a couple of summits there, aren't there, that you go over? A. Yes.

Q. Is it generally up hill from Wells to Contact?

A. Well, yes, I would say it was.

(Testimony of William A. Klitz.)

Q. Now then how far down the road did Mr. Nielson drive his truck?

The Court: We will take our recess now.

(Recess taken at 11:50 a.m.) [178]

Afternoon Session, February 9, 1950

Presence of the jury stipulated.

Mr. Platt: If the Court please, I ask permission of the Court, on behalf of the defendant Standard Oil Company of California, to substitute for Defendant's Exhibit A, which is the wholesale distributor agreement, a photostatic copy of it and withdraw the original. I have consulted counsel and they offer no objection.

The Court: The substitution may be made.

MR. KLITZ

resumes the witness stand.

Mr. Parry: We offer Mr. Klitz for cross-examination.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Klitz, you testified that you live at Contact? A. Right.

Q. You are a mechanic? A. Right.

Q. And you have a small shop? A. Yes.

Q. Where is the shop located?

A. It is located up in the old Contact, directly north of what is now the business.

(Testimony of William A. Klitz.)

Q. And you do work for people at Contact?

A. Yes, and tourists. [179]

Q. I believe you testified that you have known Mr. Moseley since about the summer of '45?

A. That is about right.

Q. That is when you came back from the army?

A. That's right.

Q. You stated also that you frequented the Mineral Hot Springs since 1945?

A. Well, I was there occasionally, yes.

Q. How frequent would you say?

A. Well, sometimes maybe I was there every day. It all depends on whether I needed anything from the store or if I was called there.

Q. Did you ever go down there to drink?

A. Yes.

Q. Frequently?

A. No, I wouldn't say frequently.

Q. How often?

A. Well, I would say probably twice a month, three times a month. It varied. No exact time.

Q. On the day in question you testified that you went down there about eleven o'clock in the morning?

A. That's right.

Q. And you were going to buy groceries?

A. As I remember, that was what I was going to buy.

Q. What did you buy there?

A. I don't think I had completed any transaction. [180]

(Testimony of William A. Klitz.)

Q. What did you do between eleven o'clock and the time of the fire?

A. Well, I don't exactly remember what I was doing. Nothing important.

Q. What time was the fire, to the best of your recollection?

A. Well, somewhere between twelve and one o'clock, I would say.

Q. Do you recall some of the things you did during that interval of time, an hour to possibly two hours?

A. Well, this Mineral Hot Springs was a place where people went there if they didn't have anything to do, they could go there and sit there and watch what went on if they wanted to. That is what I was doing that day.

Q. Sitting around watching what was going on?

A. That's right.

Q. What was going on?

A. Well, there hadn't been much of anything that day. It was quiet.

Q. Who was in the store?

A. Mr. Moseley and myself.

Q. Was that in the store or in the saloon?

A. That was in the bar room.

Q. Who was in the store?

A. There wasn't anybody in there that I know of.

Q. The store was left unattended?

A. That's right. [181]

(Testimony of William A. Klitz.)

Q. You and Mr. Moseley were in the bar room, is that right? A. That's right.

Q. When you went to the Hot Springs that morning at eleven o'clock, did you go directly into the bar room? A. Well, I suppose I did.

Q. Do you remember whether you did or not?

A. Well, I wouldn't say for sure that I went directly into the bar room. You could get into the bar by going into the store.

Q. Were you in the store that morning?

A. Well, I hadn't spent any time in the store. I could have passed through the store.

Q. You hadn't bought your groceries?

A. No.

Q. Where did you spend the greater part of that time, in the store or the saloon?

A. The bulk of the time I was in the bar I would say.

Q. Were you drinking? A. No.

Q. Had you had anything to drink?

A. No, that morning I hadn't.

Q. Did you have anything to drink later on that day?

Mr. Parry: Objected to as immaterial.

The Court: Objection sustained.

Q. (By Mr. Puccinelli): Did you ever buy any groceries that day? [182]

A. No, I didn't get any groceries that day.

Q. Now you described the picture machine as being 4 by 4 by 6? A. Approximately.

Q. With a screen that was approximately 2 by 2?

(Testimony of William A. Klitz.)

A. Yes.

Q. And of wood construction?

A. The cabinet of the machine.

Q. Was that the approximate location of the machine, as has been indicated on this map, that portion of it designated as the bar?

A. Yes, that is approximately the location of the machine. There is one little item here wasn't shown on this map. The ladies' and men's toilets were located right here at the rear of this building and there was a partition set right in here and the location of the picture machine was right in front of this partition, right here, that is the very edge.

Q. In other words, Dale, this picture machine was not at the extreme end of the building?

A. No, it wasn't.

Q. It was up here farther, it was beyond the partition? A. Yes.

Q. To the best of your recollection, Dale, about what time did you first see Lee Nielson?

A. Well, he came into the bar. [183]

Q. And you never saw him before that, is that right, that day? A. That day?

Q. Yes. A. No.

Q. And at the time he came into the bar, what were you doing?

A. Well, I would assume I was just sitting there at the bar.

Q. And what was Mr. Moseley doing, if you remember?

(Testimony of William A. Klitz.)

A. Well, he wasn't doing anything particular. As I say, it was a slow day and he wasn't busy.

Q. You have no recollection as to what he was doing at that time and you believe that you were just sitting at the bar? A. That's right.

Q. At that time had you had anything to drink?

A. No, I wasn't drinking that morning.

Q. Now I believe that you testified when you drove up in your car you parked it down here in front of the oil house? A. That's right.

Q. And you came from the south?

A. From the south.

Q. Going north? A. That is right.

Q. You went beyond the cabin and parked it down here in front of the oil house?

A. That's right.

Q. You had gone to the store to get groceries, hadn't you? [184]

A. Well, I didn't make a definite statement and say that I had gone there particularly for groceries that day, but I could have gone there for groceries.

Q. Do you remember why you went to the store?

A. As I said, it was a place to gather. You go there and see what is going on. If there is anything there of interest or——

Q. (Interrupting): Now, Dale, in answer to a question put to you on direct examination you were asked specifically what your purpose was in going to the store and you answered that your purpose in going there was to buy groceries.

(Testimony of William A. Klitz.)

A. Well, it could have been. That is quite a while ago. I couldn't say definitely that I did go there to get some groceries because I don't remember.

Q. In other words, you don't know why you went there, isn't that the truth?

A. No, it isn't the truth.

Q. Then why did you go?

A. Well, I could have gone there to see just what was going on.

Q. In other words, your reason for travelling there could have been attributed to one of many things—to get groceries, to visit, to sit down and see what was going on? A. That's right.

Q. And it could have been for the reason of your wanting to get a drink? [185]

A. No, as I stated before, I wasn't drinking that morning.

Q. That morning you weren't drinking?

A. That's right.

Q. Now how long did Lee Nielson remain in the bar room before he left?

A. Well, I couldn't say how long.

Q. Your best estimate?

A. Well, between probably fifteen minutes to half an hour.

Q. When did you again see Lee Nielson?

A. When he came back into the building after he moved his truck to the west side of the pumps.

Q. And it was not until he came back in that you saw him? A. That's right.

(Testimony of William A. Klitz.)

Q. When he came back in the second time, what were you doing?

A. I was still just sitting there in the bar room.

Q. At the bar?

A. Well, I wouldn't say I was at the bar. I was in the bar room.

Q. Just sitting there? A. That's right.

Q. What was Mr. Moseley doing?

A. Well, there still wasn't any customers in the building. Inasmuch as he was there to take care of customers, I don't suppose he was doing anything much.

Q. When he came back in the second time what, if anything, did [186] Mr. Nielson do, if you recall?

A. Well, he went back to the picture machine, proceeded to play it.

Q. And about what time was this?

A. Well, I don't know. I can't give you the exact time on that.

Q. Your best estimate?

A. Well, I would probably say it was 30 minutes or 40 minutes after he got there, probably forty-five.

Q. In other words, he had been there then approximately 45 minutes, is that correct?

A. That is just approximate. I don't know exactly what time elapsed.

Q. Now how long had Mr. Nielson been in the place the second time before the picture machine started to act up?

A. Well, I don't know that either. I would say approximately ten minutes, maybe fifteen, something like that.

(Testimony of William A. Klitz.)

Q. Now had you ever examined that picture machine before that day? A. No, I hadn't.

Q. Would you please explain to me again how that picture machine operates?

A. Well, it is a coin operated machine to begin with. It takes a coin to start it and it shows this picture on the screen and also has large figures inside playing music while [187] the person on the screen is doing their act, or whatever they have to do.

Q. Describe to me the mechanics, the workings of the machine.

A. OK. Inside you have the projector just like you have in a theater, just exactly the same thing, and also there is an amplifier in there that picks up your sound on the film to pass the sound to these four speakers which I said were located inside the cabinet.

Q. How does the film operate?

A. Well, the film is run through the projector just like it is in any projector.

Q. It is on a regular track?

A. Well, it runs through what is known as film track, the projector.

Q. How long did you examine the machine that day?

A. Well, I would say probably five minutes.

Q. And you were able to ascertain all this in five minutes? A. You mean——

Q. Answer my question—were you able to ascertain all that in five minutes? A. Yes.

(Testimony of William A. Klitz.)

Q. I believe you stated that you figured that the reason why the film was flickering was that it was off the track, is that correct?

A. That is what I said. [188]

Q. Now that film, being off the track, was nevertheless operating and projecting pictures which you could see, isn't that correct?

A. It was projecting pictures which you could see, but the picture had a flicker in it, that's all.

Q. But you could distinguish it?

A. Yes, you could distinguish it.

Q. In other words, your testimony on direct examination is to the effect it was just annoying?

A. That is right, it was annoying.

Q. But it was off the track?

A. That's what I stated, yes.

Q. Who was in that place at that time besides yourself?

A. Mr. Moseley, Mr. Nielson and myself.

Q. Where was Bill Hacker?

A. I don't know.

Q. Was Bill Hacker ever in that place?

A. He had been earlier in the day.

Q. Was he there during the time that Lee Nielson was there?

A. He could have been in there at the time Lee was there.

Q. Do you know whether he was or not?

A. I don't know. He had been there that morning. I had seen him that morning.

Q. Had you seen him in the bar room?

(Testimony of William A. Klitz.)

A. Yes, he had been in the bar room. [189]

Q. Now I believe you testified, Dale, that at the time you first noted the existence of any fire was when you looked up from where you were examining the machine and noticed that every one was gone?

A. That's right.

Q. Did you hear any noise? A. No.

Q. Did you hear any explosion? A. None.

Q. Did anybody utter a sound?

A. Well, they could have.

Q. Did they?

A. Could I explain it please?

Q. Yes.

A. The reason I say they could have, and also there could have been an explosion, was due to the fact that I had my head inside this machine and as you know, four loud speakers being turned up with any volume will make a considerable bit of noise themselves. That is why I say even if any one had hollered in the place I wouldn't have heard.

Q. But you had your head inside the machine?

A. Yes.

Q. Didn't you testify on direct examination, in answer to question by plaintiff's counsel to that very same question, "Did you have your head in the machine?" you said no. Wasn't [190] that your testimony, you said no?

A. I didn't tell far enough. I was going to state I put it in there so I could see.

Q. You testified on direct examination the extent

(Testimony of William A. Klitz.)

of your examination at that time was to open the door and simply look in from the outside?

A. That is right.

Q. Now for the sake of this jury and Court tell us exactly your position with reference to the opening into that machine.

A. My position, as I explained before, that door opens to the front. I was behind that door. My view of the whole front of the bar was blocked by the door.

Q. That is right, and you were removed some point away from the machine, isn't that correct, that is, your face?

A. Well, my face wasn't right up under in the machine, no.

Q. That's right. Now when you first looked up, I want you to describe just exactly what you saw.

A. Well, when I looked up I saw flames out there in front of the building.

Q. Where?

A. Coming across the windows and the door to the bar room.

Q. You saw flames coming across here?

A. That's right.

Q. Is that correct? A. That is right. [191]

Q. Did you go out that front door?

A. I went out the front door, yes, sir.

Q. Was the fire here then?

A. Yes, there was fire there. I went out through the flame.

Q. Did you get burned?

(Testimony of William A. Klitz.)

A. No, I didn't get burned.

Q. Not at all? A. Not at all.

Q. Scorched?

A. Not so it was noticeable. I say I didn't get burned or scorched that I noticed. I could have some.

Q. When you got outside, Dale, I want you to state exactly what you did.

A. What I did?

Q. Yes.

A. Well, when I got outside, I turned around and looked at the fire and made up my mind there was nothing I could do to help put the fire out because it was out of control right then, so my next thought was my car, which was parked over there in front of that oil house. Well, instead of going around the west to my car, I went around behind, due to the fact I expected an explosion because the truck was there and it was afire and everything was afire. That was my reason for going around behind the building and coming back to my car.

Q. Let me see if I understand you. Your reason for going [192] here instead of going from the south to the north in front of the building to the car, you went to the rear, was because the gas truck was on fire?

A. So it wasn't only the gas truck, it was everything else.

Q. Isn't it a fact this morning, on direct examination, you testified that you never saw that truck

(Testimony of William A. Klitz.)

until after you got behind the building to your car and saw it parked up here?

Mr. Parry: I object to that as not being in the record.

The Court: My recollection is when he got to his car the truck had been moved.

Mr. Halley: That is correct.

Mr. Wilson: I have a statement when Mr. Klitz got around to his car Nielson had moved the car north on the road.

Mr. Halley: That is right.

The Court: I don't recall myself any testimony or any statement by the witness on direct examination as to the position of the truck after he noticed the fire. There could have been, but I don't recall it.

Mr. Puccinelli: The portion of the testimony I have reference to, and this is my recollection—I realize I could very well be in error—was his testimony to the effect that when he came out of the building, he neither saw Mr. Nielson, Mr. Moseley, nor the truck. [193]

The Court: He said that when he noticed the fire in the bar room he noticed no one in there at the time. They had moved out just before he noticed the fire.

Mr. Puccinelli: For the purpose of expediting, I withdraw the question.

The Court: Is there any question about that? Isn't that your understanding of the testimony, when his attention was first called to the fire he didn't see Mr. Moseley or Mr. Nielson?

(Testimony of William A. Klitz.)

Mr. Halley: That is correct.

Mr. Puccinelli: That is correct. I withdraw the question.

Q. (By Mr. Puccinelli): Did you see Mr. Nielson when you went out? A. No.

Q. Did you see Mr. Moseley?

A. As I remember, I didn't, no.

Q. That is when you ran around the building to your car? A. That's right.

Q. Now about the time that you got here—so that I may be properly informed—did you see the truck already parked there or was the truck in motion?

A. As I remember, by the time I got back around there Mr. Nielson had already pulled the truck north on the highway.

Q. Did you see Mr. Nielson pull the truck? [194]

A. No, I did not. As I stated before, when I got back around to my car, the truck was north on the highway.

Q. And all you know is that some one moved the truck there and Mr. Nielson was simply an assumption on your part?

A. Well, he was the truck driver. It didn't move itself down there.

Q. And you simply assume or believe he was the man that moved it, isn't that a fact?

A. That's right.

Q. Now I want you to describe how the truck was burning?

A. Well, it was burning on the top, that is, at the tops of the tank, and they had some barrels in

(Testimony of William A. Klitz.)

back and that had something in them, I don't know exactly what it was, and they were burning, and also I did notice that the tires on the right rear side of the truck were afire.

Q. And other than what you have just described here, you saw no other portion of that truck burning, is that correct?

A. Yes, that is correct. Of course, I couldn't see the front of it, due to the fact the truck was facing north.

Q. Now, Dale, I believe you stated also that one of the reasons why you did not attempt to fight the fire was that there was no water?

A. Well, that's right.

Q. There was no water there for fighting fire?

A. There wasn't water there that we could get to. [195]

Q. I want to call your attention to later and ask you to state—you were present in the vicinity—when Mr. Zilliox helped put the fire out by the use of water being poured into buckets and poured on to the part that was burning?

A. Well, I suppose I was there some place. I wouldn't say I saw Mr. Zilliox.

Q. Well, if you didn't see him, just say no.

A. No.

Q. When did you next see Mr. Nielson?

A. The next time I saw Mr. Nielson was he had been fighting the fire again in his truck and he used an extinguisher that he had with his truck and the truck was still afire, so he ran back to my

(Testimony of William A. Klitz.)

pick-up, came back and asked for a shovel, and I had a short handled shovel in the back of my pick-up. He got that shovel and went back.

Q. Where was your pick-up at the time he got your shovel?

A. Parked down there by the engine.

Q. Is that the pump house?

A. Yes, that is the pump house. The engine room would be located, I believe Mr. Moseley said approximately 300 feet east of the pump house.

Q. This——

A. No, that would be north. That is the pump house.

Q. Would you come here and show us what you mean by the approximate location? [196]

A. This is the water pump house. The engine room was located approximately right here.

Q. Would you mark that, we will say "ER." Do I understand you to say that he came back and asked you for permission to use your shovel?

A. No, he didn't ask me for permission to use it. He just asked for a shovel and I had one in my pick-up.

Q. Where were you at that time when he asked you for the shovel?

A. Well, I think I was sort of east, or somewhere near, I would say, of the engine room.

Q. Who, if anyone else, did you see?

A. Right then?

Q. Yes.

(Testimony of William A. Klitz.)

A. Mr. Nielson was alone when he came for the shovel.

Q. Who, if any one else, was there with you?

A. Well, I don't remember anybody being right there with me at that time.

Q. Who, if any one else, if you recall, was in the vicinity of what was burning?

A. Well, Mr. Moseley was there and at that time I don't think any of the help was there, any people that came from San Juacinto to help fight the fire had gotten there.

Q. When did you again see Mr. Nielson?

A. I think the next time I saw him was after the fire was over. [197] Brought back after his burns were treated.

Q. Where were his burns treated?

A. Well, I don't know who treated his burns, but I heard later that he was treated at Ray King's place.

Q. Where is Ray King's place situated with reference to the Mineral Hot Springs?

A. Approximately a mile and a half south.

Q. In this direction? A. That is right.

Q. Toward Wells? A. Yes.

Q. I understood you testified that Mr. Nielson was taken down to Ray King's, had his burns treated and then came back to Mineral Hot Springs?

A. He was back there that afternoon, yes.

Q. And I believe you testified that you were able to tell or distinguish that he had been burned?

A. When I saw him again I could, yes.

(Testimony of William A. Klitz.)

Q. I want you to describe the extent to which he was burned and the location of the burns.

A. Well, his hands were burned and his face was burned. Now as to the extent of the burns, I wouldn't know about it, how to explain how bad they were.

Q. Did they impress you as being bad burns?

A. Well, yes, I would say they were bad [198] burns.

Q. Dale, when you left the place and went out the front door and down around back, was there any fire back there?

A. There was no fire back there.

Q. None at all? A. None at all.

Q. That is where you go into that underground basement?

A. At the rear of that building, yes.

Q. There was no fire there?

A. There was no fire there.

Q. And you didn't run around there until after Mr. Moseley had left the place, Mr. Nielson had left the place and you would have a chance to go outside and observe the condition of the fire and then ran and went back by yourself, is that correct?

A. That is correct.

Q. And the fire had not reached that location?

A. Well, that's right, but that didn't take me very long because I was running from the time I started.

Q. Who were the first people that you recall

(Testimony of William A. Klitz.)

coming to the scene of the fire besides yourself and Mr. Nielson and Mr. Moseley?

A. The people that came from San Juacinto.

Q. Do you remember who they were?

A. Well, not very many of them. I remember seeing Mr. Zilliox there and Mr. McLean was there too, I believe, and [199] then there was the men that were employed at San Juacinto. I can't name them because I have forgotten.

Q. Did you see Mr. Ward there?

A. His name is Wore.

Q. Mr. Wore, I am sorry.

A. Yes, I saw him there.

Q. Mr. Klitz, how long after the fire had started did you first see Mr. Zilliox?

A. I wouldn't know how long.

Q. Could you give us your best estimate?

A. Well, I couldn't give you an estimate, due to the excitement caused by the fire. Time didn't mean anything then.

Q. Were you excited at that time?

A. Sure I was excited.

Q. Excited to such an extent that your recollection as to what might have taken place may be erroneous? A. Well, no, I wouldn't say that.

Q. Not that excited?

A. That's right. Anybody is excited at a fire.

Q. When Mr. Nielson came down and asked for the shovel to help fight the fire, did you offer to help him? A. No.

Q. Why?

(Testimony of William A. Klitz.)

A. Because as I said before, I knew there was gasoline in that truck and I expected an explosion. As for myself, I thought Mr. [200] Nielson foolish to try to fight it because if it exploded he would have been killed.

Q. So you simply watched him fight it?

A. I wouldn't have got anything for it if I had.

Q. Is that the only thing that determined you, the fact that you wouldn't have got anything and the fact it was dangerous?

A. I would say it was.

Mr. Puccinelli: That's all.

Cross-Examination

By Mr. Platt:

Q. Mr. Klitz, I am interested in that movie picture machine about which you testified.

A. Yes.

Q. What was the source of power to operate that machine?

A. It was operated by electricity which was furnished by the light plant.

Q. So the electricity was furnished by the Delco light plant? A. That's right.

Q. Which furnished general electricity for the place? A. Yes.

Q. What was the construction, briefly, if you know, of the inside of that movie machine?

A. Well, I just explained that once. I can go through it again, but it would be just the same thing.

(Testimony of William A. Klitz.)

Q. Well, let me ask you this—was there any electric motor [201] on the inside of the machine?

A. Yes.

Q. And connected with that electric motor was there what we call an electrical brush, or just a brush?

A. Well, I wouldn't know whether that was the particular type motor that used a brush or not. All motors don't use brushes.

Q. Well, do you know whether there was a brush in there or whether there wasn't?

A. I don't know.

Q. In other words, there may have been or there may not have been? A. That's right.

Q. And there was some trouble with the machine—you say it went off the track and it flickered?

A. Well, the trouble was just the flicker. It made the picture jump, is all, just a jump like that.

Q. Could that have been caused by any other reason?

A. No, because the machine was operating all the time. As a matter of fact, when I left the building it was still operating.

Q. It was still operating?

A. The machine was still operating.

Q. While it was in operation, was there a light within it? A. Yes, there was a light.

Q. There had to be a light on the inside of the machine in [202] order to make the projection on the screen? A. That's right.

Q. To make it visible. So you are satisfied that

(Testimony of William A. Klitz.)

at or about the time of the fire there was a light in the machine? A. Yes.

Q. And that that light was burning?

A. That's right.

Mr. Platt: That's all.

Redirect Examination

By Mr. Parry:

Q. Mr. Klitz, this film, was it on spools and run up through the projector in front of the lens?

A. Yes.

Q. Are you familiar with these home movie projectors?

A. Well, not too familiar. I don't own one myself but I have seen them.

Q. Is this projector in the machine similar to one of those? A. Yes, it was the same.

Q. What moves the film past the lens as it shows on the screen?

A. Well, there is a crank that moves it past the lens?

Q. Are there perforations in the film?

A. Yes.

Q. Where was this film off the track? Where did it slip off, do you know? [203] Is it where that crank hit the perforations?

A. Yes, that is right. You see the crank didn't hit the film correctly, was the trouble.

Q. The motor was turning? A. Yes.

Q. When you drew that engine house, did you attempt to draw it to scale? A. No, sir.

(Testimony of William A. Klitz.)

Q. About how far was it from the pump house, if you know? Do you remember?

A. Well, I would say probably in the neighborhood of one hundred yards.

Q. After you drove your pick-up truck down there, did you go near that engine house or power house?

A. Yes, I did, I went in there and shut the plant off.

Q. What kind of a plant was it, if you know?

A. Well, the plant they had operating at that time was a Diesel.

Q. And you turned it off? A. Yes.

Q. Who is this chap Bill Hacker who is mentioned every now and then?

A. Well, I don't know him very well myself. He is just a character that has been spent some time in that vicinity.

Mr. Platt: I think that is all. [204]

The Court: Any further questions? Witness excused.

WILLIAM RAMSEY BLACK

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name?

A. William Ramsey Black.

Q. Where do you reside?

A. At present in Minidoka, Idaho.

Q. What is your business or occupation?

A. Railroad telegraph operator.

Q. How long have you followed that business?

A. About 22 years.

Q. By what railroad company are you employed?

A. Union Pacific.

Q. How long have you worked for the Union Pacific? A. Twenty-two years.

Q. Were you at any time located at Contact, Nevada? A. Yes, sir.

Q. During what period of time were you there?

A. About December, 1945, is the date we moved there, about three years and a half.

Q. What position did you occupy there at Contact? A. Agent.

Q. Was it a one-man station? Did you run it there? A. Yes, sir. [205]

Q. Telegraph operator and agent?

A. Yes, sir.

Q. Do you remember they had a fire there at Mineral Hot Springs? A. Yes, sir, I do.

(Testimony of William Ramsey Black.)

Q. What did you first see or know or notice about the fire?

A. The first thing we noticed—I don't recall how we were notified—we saw a great flame of smoke billowing in the air.

Q. Could you see that from your railroad station there? A. Yes.

Q. Later in the day did you go up to Mineral Hot Springs? A. Yes, sir.

Q. How did you travel? A. In a car.

Q. What kind of car did you have?

A. Ford, about '37 model.

Q. Were you alone or did some one drive with you?

A. No, my wife and two children went with me.

Q. About what time of day was it when you got up there?

A. It was approximately 6:30, in the afternoon.

Q. What had happened to the buildings there at the time you got there?

A. They were burned up.

Q. Did you stop your car?

A. Yes, sir. [206]

Q. Where did you stop it with reference to where the service station and pumps had been?

A. I stopped my car facing what had been the front of the building. In other words, front of the building and I were facing together.

Q. About how far away from the building?

A. Oh, approximately 20 feet. That would be

(Testimony of William Ramsey Black.)

hard to say definitely. I would say between 15 and possibly 20 feet.

Q. How close were you to that concrete island where the gasoline pumps were located?

A. Oh, my first estimate there, between 15 and 30 feet.

Q. Where were you from the pumps, which direction?

A. I was west of the location of the pumps, east of the pumps.

Q. How was your car pointed, in what direction?

A. Pointed facing down toward the front of the building.

Q. In an easterly direction? A. Yes, sir.

Q. Do you know Mr. Odermatt well?

A. Yes, sir.

Q. Did you see him there at that time?

A. Yes, sir.

Q. Did you observe what was around there in the neighborhood of those two pumps that had been out there at the west edge of the canopy? [207]

A. The remains of a hose was there.

Q. Did you see the filler pipe that they filled the gas tanks with? A. Yes, sir.

Q. Was that filler pipe open or closed?

A. There was some kind of cap, I couldn't tell you exactly what kind, something that hinges back, and that was up and the spout of the hose was in that filler pipe.

Q. And what else did you see beside the remains of the hose?

(Testimony of William Ramsey Black.)

A. Well, the coil wire, that part of the hose that had not burned, that and some of the fabric part of the hose. The wire in that fabric for the length of the hose.

Q. How was that hose lying there that you saw? What direction was it running, what position was it in, if you remember?

A. It was lying on an angle in relation to the building, east—oh, it was more or less north and south, maybe a 15 or possibly per cent variation.

Q. While you sat there in your car what, if anything, was done with respect to that wire coil that was in that nozzle?

A. There was something done.

Q. What was done?

A. I observed Mr. Odermatt remove the fixture from the end of that hose, the remainder of that hose, and then remove the spout from the underground filler pipe, I think the filler pipe to the underground storage tank, and then take the [208] coil wire and throw it into the burning remains of the building.

Q. Where did he throw that wire?

A. Into the burning remains of the main building.

Q. That was in what you call the basement, or something of that sort? A. Yes, sir.

Q. Did you see any one else around there at the time you saw that wire from the hose laying there?

Q. There were other people there at the time. I recall having seen Mrs. MacLean, Mrs. McLean's

(Testimony of William Ramsey Black.)

mother, I believe her name is Blethen. I saw Mr. Odermatt.

Q. What did Mr. Odermatt do with the nozzle that was in the filler pipe? A. I don't know.

Q. Did he throw that into the building?

A. I don't know. I only saw the wire.

Q. I have here a photograph which is marked Plaintiff's Exhibit 8. I will ask you first if you have seen that photograph before? A. Yes, sir.

Q. And do you recognize the objects shown thereon? A. That is the coil of wire.

Q. In what place?

A. That is down in the basement, what you described a while ago as the basement. After the entire building was burned, [209] that is what was left, just the pit.

Q. Is that a correct photographic representation of the way that wire was after it had been thrown down there? A. Yes.

Mr. Parry: We offer in evidence Plaintiff's Exhibit 8.

Q. Do you know who took the picture?

A. No, sir, I do not. It is speculation.

Q. Where did you see the picture before, do you recall?

The Court: Ask him first if he ever saw it before.

A. Yes, sir, I have seen it.

Q. Where and when did you see it before?

A. Oh, it must have been Tuesday evening I saw that picture here in Carson City.

Q. You have studied it before now?

(Testimony of William Ramsey Black.)

A. I have seen it enough to be satisfied with that is a reproduction of that scene there.

Mr. Parry: Any objection?

Mr. Vargas: May I inquire, if the Court please?

The Court: You may do so.

Q. (By Mr. Vargas): You say you saw this picture when?

A. I said I saw that picture Tuesday evening.

Q. Last Tuesday evening? A. Yes, sir.

Q. Is that the first time you had seen it?

A. That picture, yes, that is the first time I had seen that [210] particular picture.

Q. Where did you see it last Tuesday?

A. Here in Carson City.

Q. Who was present then?

A. These gentlemen who are present now.

Q. Are you referring to the three attorneys for the plaintiff? A. Yes, sir.

Q. What portion of the basement of the bar does the picture depict?

A. May I come down to the board?

Q. Yes.

A. Well, the coil wire was thrown across where I am pointing and that tallies with the position of the coil wire there.

Mr. Vargas: No further examination with reference to the foundation. We have no objection. Do you, Mr. Platt?

Mr. Platt: No, I have none.

The Court: Admitted in evidence as Plaintiff's Exhibit No. 8.

(Testimony of William Ramsey Black.)

Q. (By Mr. Parry): Mr. Black, at that time did you notice anything lying there by the pumps where the wire had been after the wire was removed?

A. Some pieces of fabric was still lying there.

Q. Did you see those lying there? A. Yes.

Q. I will ask you if you have seen this picture which I have [211] had marked Plaintiff's Exhibit 9?

A. Yes, sir, I have seen this at the same time I saw the other picture.

Q. Have you studied it?

A. Yes, sir, to the extent that I am satisfied in my mind this is the picture of those pieces of fabric.

Q. Did you see those pictures at any earlier date when they were on a smaller scale?

A. No, sir, I did not.

Q. Does that correctly portray that fabric as it was lying there after the wire had been removed?

A. Yes, sir.

Q. What object was that fabric lying on?

A. That was lying on the concrete—I can't tell you definitely whether that is the concrete island or gravel or what it is—but it is lying there.

Q. On the foundation around the pump?

A. On the foundation.

Mr. Parry: We offer in evidence Plaintiff's Exhibit 9.

Q. (By Mr. Vargas): Have you seen this Plaintiff's Exhibit 9 before?

The Court: He already testified he saw it at the same time he saw the other picture, Mr. Vargas.

(Testimony of William Ramsey Black.)

Q. Last Tuesday evening?

A. Yes, sir. [212]

Mr. Vargas: No objection.

The Court: It may be admitted as Plaintiff's Exhibit No. 9.

Q. (By Mr. Parry): Calling your attention again to this Exhibit 9, is there anything there that showed the impressions of the wire which you can point out on that picture?

Mr. Halley: Doesn't the photograph speak for itself, your Honor?

The Court: Well, the objection will be overruled.

Q. Can you point out the piece of fabric?

A. Yes, sir, I can.

Q. Show it to the jury.

A. (Indicating): The pieces of fabric.

Q. Are they lying along that sort of rough line?

A. Yes, sir.

Mr. Parry: We would like to show photographs Exhibits 8 and 9 to the jury, if we may, your Honor.

The Court: You may do so.

(Exhibits shown to the jury.)

Mr. Parry: You may cross-examine.

Cross-Examination

By Mr. Vargas:

Q. What time of day was it that you saw this smoke?

A. I don't know exactly, some time between ten and say one p.m. [213]

Q. Can you fix it any closer than that at all?

(Testimony of William Ramsey Black.)

A. No.

Q. And you say it was around 6:30 when you and Mrs. Black drove over there? A. Yes, sir.

Q. Was it dark when you got over there?

A. No.

Q. You saw several people in the vicinity?

A. Yes, sir.

Q. Mrs. McLean?

A. I recall seeing Mrs. McLean, Mrs. McLean's mother, Mr. Odermatt, and there were others, but offhand I can't recall their names.

Q. Do you recall about where you saw Mrs. McLean and her mother?

A. They were somewhere close to my car. They were parked by the side of the road.

Q. In parking your car, did you park to the east of the highway or to the west?

A. To the east of the highway, just inside the pump.

Q. In other words, you were between the highway and what portion of the front of the structure?

A. Up there approximately where that "W" is.

Q. That may be misleading because that is right on the highway. At any rate, you were between the easterly edge and the [214] highway? A. Yes.

Q. And the westerly edge is the place where the gas pumps were? A. Yes, sir, that is true.

Q. And parked in there facing east?

A. Facing east.

Q. Now you say Mrs. McLean's car was parked in there too?

(Testimony of William Ramsey Black.)

A. Somewhere in that general vicinity.

Q. Were there any other cars parked around there any place?

A. There were, but I couldn't locate them.

Q. Do you have any idea about how many?

A. I don't have any idea.

Q. And the people you observed were right around the vicinity of those cars?

A. They were more or less in the general vicinity of the buildings, what was left of the buildings.

Q. Can you name any other people that you saw there at that time?

A. Just those I named are all I can think of. My wife was in the crowd somewhere because I brought her with me.

Q. There were, however, a number of people right around that vicinity whom you can't now identify? A. Yes, sir.

Q. Now referring to Plaintiff's Exhibit No. 8, Mr. Black, it [215] appears from the center upward in that picture there is some kind of concrete blocks or something? A. Yes.

Q. What were those? A. What were those?

Q. Yes, what were these apparently concrete blocks?

A. They were part of the wall of the basement, or something like that.

Q. Can you identify that for me as to what it is?

A. Part of the building structure.

Q. What part?

A. This here is the coil wire.

(Testimony of William Ramsey Black.)

Q. I am interested right now in these concrete blocks. Would they be in the back end of the building or the front?

A. Those are limestone blocks and that is out of the building structure.

Q. What portion of the building, the front end of the bar?

A. That front portion where I indicated is where I estimated was the front of the building.

Q. Now apparently there is some kind of opening top center of this photograph, Exhibit 8?

A. That is out toward the ground. I presume that is that building.

Q. Toward the highway?

A. I think so, yes. [216]

Q. It would appear from this picture that that leads into another opening. Do you know what this other opening appears to be? A. No.

Q. There appears to be a square at the top, almost center of Exhibit 8, is that another opening?

A. I don't know.

Q. Would you say that that outlining, represented by these concrete blocks on either side of Plaintiff's Exhibit 8, represent the front of the former bar structure?

A. I would say that it does.

Q. Well, was there any excavation out in front?

A. I wouldn't know about that because I had nothing to do with the buildings. I wasn't around the place during the time they were built. I wouldn't know anything about the construction.

(Testimony of William Ramsey Black.)

Q. Did you observe that on the evening of the fire?

A. Only just a shell. The walls of the building stood as a shell and the buildings themselves were more or less a pit contained within those walls. I mean what had been the walls of the building.

Q. Now assuming that these concrete blocks that appear here are the front of the shell remaining of the bar structure, can you explain what appears to be this excavating up in this top center of the photograph? [217]

A. No, I can't.

Q. Now referring to Plaintiff's Exhibit No. 9, can you tell me why there would be a very definite dark area and a light area on either side?

A. That is a shadow from those steel posts or something from the canopy. Those things are still standing and that picture was taken some time in the afternoon in order to have good light, evidently.

Q. Would you say that picture was taken looking east or west?

A. That would be taken northeast, I would say, facing northeast. I mean that would be the way the camera would be facing.

Q. Would the bottom of this picture depict at all the concrete foundation of the gasoline tanks?

A. Yes, sir, the concrete or gravel, whatever that foundation is.

Q. These gasoline pumps set on some kind of a foundation?

A. Yes, sir.

Q. Does this picture, Plaintiff's Exhibit 9, depict that foundation?

(Testimony of William Ramsey Black.)

A. Yes, this part of it right here.

Q. Would you take this pen, please, Mr. Black, and trace a line across Plaintiff's Exhibit 9 and outline the portion that you believe depicts the foundation of the gas pumps?

A. I can't do that.

Q. You can't pick out any portion of the foundation there at [218] all?

A. I can pick out some portion here, but I can't separate the foundation and the rest of the picture there.

Q. What portion can you pick out?

A. I can pick this out here very definitely, where these pieces of fabric are lying, absolutely.

Q. In other words, those pieces of fabric were lying right along parallel with the foundation?

A. They were lying on an angle, as I recall, something like this.

Q. On this photograph, Plaintiff's Exhibit 9, and with reference to these pieces of fabric, can you draw an outline with that pen of the foundation?

A. No, sir, I can't.

Q. Would you say those pieces of fabric, things you have indicated as being pieces of fabric, were lying along the westerly edge of the foundation?

A. Yes, sir.

Q. Or were they lying on the easterly edge?

A. On the westerly edge.

Q. And the pieces of fabric you named along a south direction, I believe?

A. Yes, sir, north-south.

(Testimony of William Ramsey Black.)

Q. Were that minor degree of variation, you say 15 degrees?

A. Something like that, yes, sir. [219]

Q. How long did you remain around there on the occasion that you and Mrs. Black were down there?

A. That would be speculative. Possibly 45 minutes to an hour.

Q. Was the fire out at that time?

A. It was still smoldering. As I said a moment ago, the basement of the main building and what had been the floors of the foundation of the other building was a smoldering pit of burning rubble and debris and various other things.

Q. Were there any explosions while you were there?

A. Once in a while you would hear a minor explosion as though some bottle broken.

Q. Who was present at this discussion last Tuesday evening with plaintiff's counsel?

A. Myself and the gentlemen, the counsel.

Q. Yourself and the attorneys?

A. Yes, sir.

Q. Any one else?

A. Mr. Herzinger was around the building.

Q. Any one else?

A. And Mr. Moseley who has testified and Mr. Klitz.

Mr. Vargas: That is all.

The Court: Any further questions?

(Testimony of William Ramsey Black.)

Cross-Examination

By Mr. Platt:

Q. Mr. Black, I understand you testified when you came up to [220] the scene of the fire on the night of May 3, 1947, with your wife, you noticed a hose lying on the ground. About where was that hose located relative to the gasoline pumps?

A. To the best of my knowledge that is west of the pump generally.

Q. I mean in common ordinary language, you would say it was located in front of the pumps?

A. Yes, sir.

Q. And did you recognize it as a character of hose usually used to fill gasoline tanks?

A. Yes, sir, I did.

Q. And about the usual length of such a hose is in the neighborhood of about 12 feet, is that correct?

A. That is what I estimated, yes, sir.

Q. Do you recall just about how long this hose was that you saw lying on the ground?

A. That was what I estimated the length to be, somewhere between 8 to 12 feet.

Q. Would it be fair to say that that hose constituted the entire length of the hose that was probably used?

A. Well, sir, as I stated before, it appeared to have some kind of a fixture on the loose end out of the filler pipe.

Q. Did you look at both ends of this hose?

A. It could be easily seen.

(Testimony of William Ramsey Black.)

Q. What was on the one end? [221]

A. There was some kind of fixture, I wouldn't know just what it was, on the outside end of the hose.

Q. What was on the other?

A. And the other end was a filler spout or whatever you call it.

Q. Then did you get the impression, or was it your opinion, that you saw the entire length of a hose used for filling gasoline tanks?

A. Yes, I saw the skeleton remains, I mean the entire length, the skeleton.

Q. Of course it is needless for me to suggest, I know, in the light of your testimony, that this hose which you saw on the ground was not connected to a truck.

A. There was no truck there at all.

Q. The hose was lying by itself, disconnected from anything?

A. It was in the filler spout to the underground tank.

Q. One end in the filler spout but the other end disconnected from anything?

A. That's true.

Cross-Examination

By Mr. Vargas:

Q. At the time you were down there, about 6:30 in the evening, was Mr. Herzinger there?

A. He could have been there, but I couldn't positively place him there. [222]

Q. You say that just because you don't remember?

(Testimony of William Ramsey Black.)

A. There were quite a number of people there. I can't recall all those whom I saw.

Q. Mr. Herzinger was well known to you at that time, was he not? A. Yes, sir.

Q. You knew that he operated the place that was burned and you don't recall whether or not you saw him there? A. No, sir.

Q. Did you see Mr. Lee Nielson there?

A. I don't recall having seen him there.

Q. Do you know Mr. Nielson? A. Yes, sir.

Q. Or is it simply that you don't remember whether or not you saw him there at that time?

A. I don't recall having seen him.

Q. What, if anything else, did you discover Mr. Odermatt do in or about the remains of this hose?

A. Well, that was all I observed. He moved those things and observed him throwing them actually in the burning remains of the building. What he did with this spout and other fixture, I don't know.

Q. You saw him remove the rather large fixture which was on the end of the hose nozzle?

A. Yes, sir. [223]

Q. And then you saw him remove the spout. Did you see him put the cap down over the filler pipe to the underground storage?

A. I don't know if he closed that filler cap and sealed it down.

Q. You didn't see that?

A. I didn't notice that.

Mr. Vargas: That is all.

(Short recess.)

3:15 P.M.

Presence of the jury stipulated.

The Court: Any more questions?

Mr. Parry: No more questions.

(Witness excused.)

MRS. LORETTA McLEAN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name, please?

A. Loretta McLean.

Q. And where do you live?

A. I live in Twin Falls, Idaho.

Q. What do you do there?

A. I am admission clerk at the Twin Falls County Hospital.

Q. How long have you been there? [224]

A. A year and a half.

Q. Along in 1947 in May and prior to that, where did you reside?

A. At the San Juacinto Ranch in Nevada.

Q. About how far is that San Juacinto Ranch from this Mineral Hot Springs we have been talking about?

A. Between six and eight miles.

Q. Is that a ranch headquarters of the U. C. Land and Cattle Company?

A. Yes, it is cattle headquarters.

Q. There are several dwellings there?

(Testimony of Mrs. Loretta McLean.)

A. Yes, there were.

Q. How long did you reside there?

A. I moved up there shortly after V-J Day.

Q. August, 1945?

A. I moved there some time during that winter.

Q. Then how long did you folks live there?

A. Until the completion of the job, around the 15th of December of '46.

Q. Of '47? A. '47.

Q. What was the job they were doing there?

A. Well, my husband was comptroller for the U. C. Land and Cattle Company and it was disposing of these lands and the partnership was dissolved at that time, was very nearly [225] dissolved and our work was completed.

Q. You broke the large holdings up into smaller holdings? A. Yes.

Q. Were there quite a few people in and around San Juacinto?

A. Oh, yes. I wouldn't want to estimate the payroll. It took one day almost to make up the payroll for the ranch for the men employed.

Q. Along in May, 1947, it was running full?

A. It was running full. San Juacinto, I think, at the time was running to capacity.

Q. Were they operating an office there at San Juacinto, with officers, bookkeeper, etc.?

A. Yes.

Q. Did you have occasion to go down to the Mineral Hot Springs from time to time prior to this fire?

(Testimony of Mrs. Loretta McLean.)

A. Oh, yes, oh, I would say maybe once a day.

Q. Was that the nearest store or bank or anything of that sort?

A. It was the nearest, yes. We had a company store, but it didn't carry anything fresh. It was all canned. No bread and things like that.

Q. You were keeping house there at San Juacinto yourself? A. Yes, sir.

Q. Did you ever notice a kerosene refrigerator sitting in the grocery department there? [226]

A. Many times.

Q. Was it operating?

A. Never, to my knowledge.

Q. Did you ever look at it particularly?

A. Yes, I was interested in buying it at one time.

Q. Was there any sign or anything on it?

A. Yes, there was a hand-made, oh, cardboard sign, with a blue figure with the price on it, saying "For Sale."

Q. And did you look it over? A. I did.

Q. Was it operating there at the time you were looking at it?

A. I never saw it operating. That is one reason I didn't buy it, I didn't know if it could.

Q. Had that been the condition for some time prior to this fire?

A. Yes, as long as I can remember ever having seen it, it was in the store and didn't operate.

Q. Was there anything in it when you looked in, do you remember?

A. Oh, there might have been. I don't recall.

(Testimony of Mrs. Loretta McLean.)

There might have been something put in out of the way.

Q. The day of the fire, what first called your attention to the fire?

A. I was told there was a fire at San Juacinto. I don't know how they called the news in to the ranch or how, but we were [227] told there was a fire and everybody go down and help with the fire.

Q. And did you go down? A. I did.

Q. How did you go, what car?

A. I drove my own car down.

Q. Did any one go with you?

A. My mother.

Q. And when you got there what was the state of the fire?

A. Well, I didn't get too close to the fire when I came up because the truck had been moved down the highway and it wasn't in flames, but it was still smoking and afire, so I parked a little distance from that and then walked up. To my recollection everything was pretty well—as far as the main part of the building—was pretty well burned.

Q. And when you were up around there some place, did you see Mr. Nielson, the driver?

A. Yes, I did.

Q. Had you known him before?

A. I don't recall knowing him particularly. The boys, Mr. Odermatt's boys, delivered butane and gasoline to us at the ranch and I knew of Mr. Nielson, but whether I knew him or not, I am not sure.

(Testimony of Mrs. Loretta McLean.)

Q. Where was he when you first saw him that afternoon?

A. He was fighting the fire on the truck. [228]

Q. How was he trying to do it?

A. To the best of my recollection he was throwing sand and they had a box full of sand. They were trying to smother it with that. I think it was the motor they were throwing it on, but I don't know much about a truck. It was just smoke and fire, that is all I know.

Q. Were there some others around assisting him?

A. Yes, there were several.

Q. Did you recognize any of them?

A. Mr. Zilliox.

Q. Do you know whether he was down at San Juacinto ranch when you were told there was a fire, Mr. Zilliox?

A. I don't know.

Q. Did you see Mr. Nielson close enough to talk to him around there after you got there?

A. Yes, I took Mr. Nielson down to Contact to first aid.

Q. What was his condition when you first saw him?

A. Terribly excited and he looked badly burned. He was covered with soot and he was in a great deal of pain.

Q. He was? A. Yes, he was.

Q. Where did you observe the burns on him when you looked at him?

A. His hands and I thought his face. He was pretty badly covered, as I say, with soot and dirt

(Testimony of Mrs. Loretta McLean.)

and he complained of his [229] throat burning. I don't know how much fumes he could have inhaled.

Q. You took him into your car? A. I did.

Q. How soon was that after you arrived there that you took him?

A. Oh, time meant so little then. I would say somewhere between 10 or 15 minutes. The truck had been moved down into the sagebrush by that time. I would say about 15 minutes.

Q. Did any one go in the car with you to Contact?

A. Just my mother, who wasn't able to get in and out of the car without assistance.

Q. Did you have any conversation with Mr. Nielson? A. Yes.

Q. Did you have any conversation about the fire or cause of the fire?

A. Well, that is all we talked about.

Q. What did he say?

A. He kept saying——

Mr. Vargas: I object. There is not at this time any proper foundation laid.

The Court: Objection overruled. Answer the question.

A. He kept saying over and over again, "This is terrible. I never should have gone inside."

Q. And then did you stay with him down at Contact while his [230] burns were dressed?

A. Yes, I did, but there is an R.N. at Contact, that is why I took him down there, and I didn't go with her while she dressed the burns.

(Testimony of Mrs. Loretta McLean.)

Q. Who was this R.N.? Is that registered nurse?

A. Yes.

Q. Who was she? A. Frances King.

Q. Did you notice where she dressed his burns?

A. Well, afterwards, yes. She had dressed around his face and his hands and had given him something to drink, something she thought would be soothing. I don't know enough about medicine, but it was a tallow content or something to help his throat, and suggested he go to the doctor and hospital.

Q. Were his hands bandaged?

A. Not that I recall. I think she put this salve they use for burns to cover, to keep the air out. I don't believe they bandage burns.

Q. Then where did you take him?

A. I took him back.

Q. To the Hot Springs?

A. To the Hot Springs.

Q. And where did you leave him?

A. Just around the premises some place.

Q. Were you around there again in the evening when Mr. Black [231] was there?

A. Yes, I was.

Q. Do you recall that you saw Mr. Black there or not? A. I recall him.

Mr. Parry: You may cross-examine.

(Testimony of Mrs. Loretta McLean.)

Cross-Examination

By Mr. Vargas:

Q. Mrs. McLean, did you ever see this refrigerator that you say was in the store with the For Sale sign on it, at any other location than that in the store?

A. Not that I recall. I never was interested in it until I knew it was for sale. I don't recall having seen it any place before that.

Q. Over what period of time had you observed the refrigerator in the store?

A. I would say prior to the fire at least two or three months.

Q. And all during that time you say it had a sign, "For Sale"?

A. It had a sign on it, "For Sale."

Q. Do you recall how long it was before the fire that you first took a look at it?

A. No, I wouldn't know. It must have been quite some time before the fire because I returned to the ranch in September the year before and when we were rebuilding, I was interested in the refrigerator. I think I bought a refrigerator in January of that year or December, so it was prior to that. [232]

Q. You bought a refrigerator in January or December of what year?

A. Well, December of '46, it would be.

Q. Prior? A. And January of '47.

Q. December prior to the fire?

A. So it would have been a long time.

(Testimony of Mrs. Loretta McLean.)

Q. So at the time you bought your own refrigerator you had no further interest in the purchase of the refrigerator? A. No.

Q. Were you down at Mineral Hot Springs the day of this fire prior to the time you went down after the fire started? A. No, sir.

Q. Do you recall if you had been there the day before? A. No, I can't recall that I had.

Q. You say the company store at the ranch didn't carry anything fresh? A. No.

Q. And it was your practice to get your fresh vegetables at the Hot Springs?

A. Oh, occasionally the ranch got in fresh vegetables, but usually just celery and lettuce and that is about all, and if you wanted anything out of the usual line, you were expected to get it for yourself, which we did.

Q. Now I believe you testified that you didn't actually know [233] what part of the truck was burning when you saw Mr. Nielson?

A. No, I don't know. It seemed to me there was smoke coming from all over, but I don't know enough about a truck to know what could be burned.

Q. Did you go on by the truck at that time?

A. Not until after it had been moved from the highway. I was afraid of it.

Q. After it was moved?

A. Yes, it was moved and I don't know whether it was driven or pushed off. It was moved off the highway into the sagebrush.

(Testimony of Mrs. Loretta McLean.)

Q. And at that time you and Mr. Nielson went on to Contact? A. Yes.

Q. And following this Mr. Nielson returned with you to the Hot Springs? A. Yes.

Q. About how long did you stay around Hot Springs after returning from Contact?

A. I don't recall after I left my mother at Contact when I took Mr. Nielson back and had to go back after her and then stop by again or not. I know I was there three or four times during the day by going back and forth up to Contact.

Q. When you were there at the time Mr. Black was there the late part of the day, did you see Mr. Nielson then?

A. No, I don't recall seeing Mr. Nielson [234] then.

Q. Do you recall having seen Mr. Nielson on any of the occasions that you returned to the Hot Springs after your trip back from Contact?

A. No, I don't recall seeing him after I took him back.

Q. He may have been around there?

A. He may have.

Mr. Vargas: That's all.

Mr. Platt: No questions, your Honor.

Witness excused.

MRS. KATHERINE RICHARDS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name please?

A. Katherine Richards.

Q. Where do you reside?

A. Contact, Nevada.

Q. How long have you been in and around Contact? A. Thirty-one years.

Q. Do you recall they had a big fire down there at the Mineral Hot Springs? A. Yes, I do.

Q. Where were you in the early part of the day?

A. I was at Ray King's service station.

Q. Where is Ray King's service station in Contact? [235]

A. Right in Contact, just opposite the Maintenance Department.

Q. That is the Highway Maintenance?

A. Yes.

Q. About how far is that from Mineral Hot Springs? A. About a mile and a half.

Q. What were you doing there at Ray King's that day? A. I was working there.

Q. Are you related to the Kings in any way?

A. Yes, I am.

Q. What is the relationship?

A. Mrs. Ray King is my sister.

Q. And on that day did you see Mr. Nielson in a gasoline truck? A. Yes, I did.

(Testimony of Mrs. Katherine Richards.)

Q. Had you known Mr. Nielson before that?

A. Yes.

Q. He made deliveries of gasoline there at the King station? A. Yes.

Q. Where was he when you first saw him that morning?

A. Well, when he pulled the truck in from Wells to make a delivery and at the time he pulled the truck in we had quite a few cars at King's station and he said, "Well, if you are busy we will go on down to the Mineral Hot Springs and pump."

Q. What time of day was that?

A. To my estimation it was some time during our noon hour. [236]

Q. What kind of a day was it, cool or hot?

A. Very hot day.

Q. Did you notice his truck whether or not it was warm when he pulled in?

A. No. I didn't. He stopped at kind of a rock railing outside the place, stopped at the edge of that.

Q. And then what did he do, if you know, after he spoke to you?

A. He got in his truck and went down to make his delivery to Mineral Hot Springs.

Q. What did you next notice?

A. I was servicing a car and happened to be looking around and saw this big cloud of awful black smoke and rather brilliant red flame over the surface and I told my sister, I said "Mineral Hot Springs is on fire." She said, "How do you know?"

(Testimony of Mrs. Katherine Richards.)

I said "I just saw the smoke" and she ran out and saw the smoke.

Q. After that did you see Mr. Nielson there at the King Service Station? A. Yes, I did.

Q. Who brought him down?

A. Loretta McLean.

Q. What condition was he in when you saw him?

A. He was quite excited and pretty badly burned.

Q. And this nurse, is she related to you?

A. She is my niece. [237]

Q. Did you have any conversation with Mr. Nielson there?

A. The only thing that was said outside of the nurse taking care of his burns, we asked him what was the cause of the fire and he said it had to be the fault of the truck.

Mr. Parry: You may cross-examine.

Cross-Examination

By Mr. Vargas:

Q. I take it, Mrs. Richards, that you yourself didn't witness any delivery of gasoline at Mineral Hot Springs?

A. No, I never was even there. Wasn't to the fire, never saw any part of the fire.

Mr. Vargas: That's all.

Mr. Platt: No questions.

Witness excused.

EDWARD HERZINGER

being duly sworn, testified as follows:

Direct Examination

By Mr. Daly:

Q. Will you state your full name?

A. Edward Herzinger.

Q. Where do you live, Mr. Herzinger?

A. Buhl, Idaho.

Q. You are the Mr. Herzinger that has been referred to as the owner of Mineral Hot Springs, is that right?

A. Yes sir.

Q. I might ask you, Mr. Herzinger, how many service stations [238] there are between Wells, Nevada and Rogerson, Idaho?

A. At that time there were just two.

Q. And what were those two?

A. Ray King's and mine.

Q. Do you know how far it is between Wells and Rogerson, approximately?

A. Thirty-five miles from Rogerson into my place and 52 miles from my place to Rogerson, making approximately 87 miles.

Q. How long have you owned Mineral Hot Springs?

A. Since the latter part of February, '46.

Q. And are you operating under an agreement with the Standard Oil Company of California?

A. I am.

Q. At the time you purchased Mineral Hot Springs, Mr. Herzinger, was it operated under a dealer agreement, or any other agreement, with the Standard Oil Company of California?

(Testimony of Edward Herzinger.)

A. Yes sir, I was told it was under a dealer's agreement.

Q. And have you been operating under an agreement with the Standard Oil Company of California ever since you have owned the place?

A. I have.

Q. I hand you what has been marked Plaintiff's Exhibit 10 for identification and I will ask you if that is the agreement under which you were operating the Mineral Hot Springs on May 3, 1947?

A. That is a photostatic copy of the agreement they mailed to [239] me from Salt Lake City.

Q. Are you named as a party to that agreement?

A. Yes, sir.

Q. Will you look at it again?

A. I have had several agreements.

Q. Mr. Herzinger, who is O. J. McVey?

A. He was the one who started that place, as near as I recall. He started the service station and store and operated it for some ten years.

Mr. Daly: We will offer this photostatic copy in evidence.

Mr. Platt: If your Honor please, I do not think I have any objection except I would like to look at it to see that it is the same agreement. Your Honor please, we stipulate that this photostatic copy may be admitted.

Mr. Daly: I wonder, Mr. Platt, if it may also be stipulated that the plaintiff has been assigned the interests of O. J. McVey in this dealer agreement?

Mr. Platt: Well, we will stipulate to that, with

(Testimony of Edward Herzinger.)

the proviso to get a counter stipulation that at the time of the fire Mr. Herzinger was the owner of, in possession of, and had title to the property involved in this litigation. I make this suggestion in order to save time in the introduction of documents.

The Court: This suggestion is acceptable? [240]

Mr. Daly: It is acceptable. The title of the plaintiff, however, is subject to a prior lease to the Standard Oil.

Mr. Platt: There again the relation between Standard Oil and this plaintiff is a reciprocal relation. Standard Oil leases to him and he leases to Standard Oil under certain conditions and covenants and I think there is no materiality to that, as far as the case is concerned, but I can only stipulate to the facts that the written document show. There isn't any doubt but it was a reciprocal lease arrangement between Standard Oil and this gentleman with respect to the matters involved.

Mr. Daly: If the Court please, if Mr. Platt has in his possession the originals of the agreements relating to the purpose, I would suggest that they be introduced to show just what this relationship is. Unfortunately we are limited to photostatic copies which were furnished by Standard Oil. We don't have the original.

Mr. Platt: Well, we have the original of these documents and we have no objection to submitting them or having them admitted in evidence. Well, we have no objection to the admission of the photostatic

(Testimony of Edward Herzinger.)

copy of the agreement between O. J. McVey and Standard Oil Company of California of date June 3, 1941.

The Court: That is marked Exhibit 10. It may be admitted.

Mr. Platt: I wish you would bring out, in order to [241] save time, that this lease to McVey was subsequently assigned to Brown and subsequently assigned by Brown to Mr. Herzinger, this dealer's agreement that has just been offered in evidence.

Mr. Daly: I will stipulate to that. I do not think this witness knows what happened before he got there, but we will stipulate that this is a fact.

Mr. Platt: Well, I assume this witness, his obligations under the lease, were obtained by an assignment.

The Court: Wouldn't it be well if this stipulation was stated in its entirety here now to clear the record? Do you want to restate this stipulation so it will appear clearly in the record?

Mr. Platt: Yes, your Honor. I offer to stipulate that the exhibit, namely the dealer's agreement, between Standard Oil and McVey, was later assigned to Brown, by Brown later assigned to Mr. Herzinger and at the time of the fire on May 3, 1947, Mr. Herzinger was operating under that dealer's agreement.

Mr. Daly: We will so stipulate. Thank you, Mr. Platt.

Q. Mr. Herzinger, what was located at Mineral Hot Springs prior to the fire, immediately prior to

(Testimony of Edward Herzinger.)

the fire? A. You mean in line of buildings?

Q. Yes, what did you have there?

A. I had a bar room, had a grocery store along the highway and a cabin on the highway, oil house and pump house. Right behind [242] that had two cabins and north of them I had what I call a power house, where the light plant was. About a quarter of a mile east of there was five cabins, five bath houses under one roof, wash house, coal house, gas pumps. That is about all.

Q. Now, Mr. Herzinger, have you looked at this little sketch there Mr. Moseley drew on the black-board? A. Yes, I did.

Q. I ask if that represents all of the buildings which were destroyed by the fire?

A. Yes, it does, all on the highway there.

Q. Then these two cabins that you spoke of in the rear, the power house and five cabins and five bath houses, they weren't damaged by this fire?

A. No, they weren't.

Q. How did you hear about the fire, Mr. Herzinger?

A. I happened to be in Elko at that time, was on my way back to Mineral Hot Springs, and I stopped at Wells on the way and I met a party in Wells that I knew from Buhl and he asked me if I knew the Mineral Hot Springs had burned down.

Q. When was this?

A. Do you mean what time of the year?

Q. Was it the day of the fire or next day or when? A. Well, that was the day of the fire.

Q. Do you know about what time of day?

(Testimony of Edward Herzinger.)

A. I must have got to Wells, as near as I can recollect, around [243] two o'clock, in the afternoon.

Q. What did you do then?

A. I immediately went across the street to a place they call the Monte Carlo and tried to telephone down there. I tried and tried and finally central told me they couldn't make the connection.

Q. So you didn't complete the call?

A. No.

Q. What did you do then?

A. I jumped in my car then and took off for the place.

Q. Do you know what time it was that you arrived there, about?

A. Oh, I would say possibly four o'clock. It might have been a little sooner than four o'clock. I can't recollect how long.

Q. Was this the same day as the fire?

A. Yes, it was.

Q. What did you find when you got there?

A. Well, there was nothing left of the buildings along the highway, a bunch of smoldering ashes, remains of what the buildings had been, just smoldering.

Q. Does this sketch that Mr. Moseley drew accurately represent the overall dimensions of the buildings shown on here? A. Yes, it does.

Q. As they were prior to the fire? A. Yes.

Q. Handing you, Mr. Herzinger, what has been marked Plaintiff's [244] Exhibit 7 for identification,

(Testimony of Edward Herzinger.)

being a number of sheets of paper, I will ask you what those are?

A. It is a list of all——

Mr. Platt: I don't identify this exhibit by this number. May I look at it?

A. This is a list of the buildings, their size and the structure they were built out of.

Mr. Platt: May I inquire, your Honor, who made out that list and when it was made out?

A. You mean these sheets I am holding in my hand?

Q. (By Mr. Platt): Yes.

A. I made them out myself.

Q. When was it made out?

A. Oh, shortly after the fire.

Q. About how long?

A. I would say within thirty days.

Mr. Platt: That's all.

Q. (By Mr. Daly): Does the description and the dimensions shown on those sheets of paper accurately represent the buildings which were destroyed by the fire?

Mr. Platt: Just a minute before he answers. May I inquire a little further?

Q. (By Mr. Platt): Have you any plats or maps or builder's contracts or blueprints which indicate with some degree of accuracy the nature and character of those buildings? [245]

A. No, sir, I haven't.

Q. Mr. Herzinger, at any time did you take any

(Testimony of Edward Herzinger.)

measurements of these buildings, that is prior to the fire? A. Yes, sir, I did.

Q. When did you do that?

A. Oh, I would say it would be shortly after I bought the place.

Q. How long ago was that?

A. Well, that would have been possibly the early part of '46.

Q. Did you make up this memorandum from the measurements which you took them?

A. I remember the measurements of the buildings.

Q. Then it is fair to say, isn't it, Mr. Herzinger—

Mr. Daly: If the Court please, isn't this cross-examination?

The Court: Well, the exhibit is offered. What is the purpose of that?

Mr. Daly: The purpose, if the Court pleases, is to show the basis for the testimony of Mr. Knapp, in which he stated the valuations he placed on reconstructing these buildings.

The Court: It seems to me that this examination then would be in order. You may proceed.

Q. (By Mr. Platt): What I am trying to get before the Court and jury, if I can, is the best evidence. [246]

The Court: What I understood you are trying to do is to determine whether or not you are going to make an objection to this exhibit?

Mr. Platt: That's right.

(Testimony of Edward Herzinger.)

The Court: If he makes an objection—isn't he trying to find out the source of the information in this exhibit?

Mr. Parry: If that is so, we have no objection.

The Court: That is your purpose, isn't it?

Mr. Platt: Yes.

The Court: Go ahead.

Q. (By Mr. Platt): It is fair to say then, Mr. Herzinger, that this proposed exhibit here was made by you wholly from recollection?

A. Well, partly from recollection and partly from figures. I had my previous measurements.

Q. Where are those original figures?

A. I have them at home. I don't have them with me.

Q. They are at home, is that true? A. Yes.

Q. And they are available?

A. I think they are.

Q. At what place do you call your home now?

A. That would be on my ranch south of Buhl.

Mr. Platt: We object to the offer, if the Court please, on the ground it isn't the best evidence.

Mr. Daly: I might ask a question to try to clear this up.

Q. (By Mr. Daly): Mr. Herzinger, you were in these buildings a great many times, were you not?

A. Yes, I was.

Q. And you were familiar with the size of those buildings? A. Yes, sir.

Q. You became familiar with them?

A. Yes, sir.

(Testimony of Edward Herzinger.)

Q. How long had you owned this property?

A. Ever since the latter part of February, '46; a little over a year before the fire.

Q. From your observations and your experience in being inside of these buildings, do you know what the size of these buildings were?

A. Yes, I do.

Q. And this Plaintiff's Exhibit 7, was this made from your knowledge thus obtained?

A. Well, I knew the size.

The Court: Is this the memorandum the contractor used to make his estimate?

Mr. Daly: That is correct.

The Court: Objection will be overruled. It may be admitted [248] in evidence. No. 7.

Mr. Vargas: May the record show, if the Court please, an exception to the Court's ruling?

The Court: You may have an exception.

Q. (By Mr. Daly): Mr. Herzinger, did you give these sheets of paper, being Plaintiff's Exhibit 7, to Mr. Dalton Knapp of Elko for the purpose of his making an estimate for rebuilding those buildings? A. Yes, sir, I did.

Q. Now to get back, Mr. Herzinger, to the day of the fire. What did you do when you arrived at Mineral Hot Springs that evening?

A. Well, there wasn't much I could do. Drove up there and parked my car and started to talk with the people there, tried to find out what the cause of the fire was.

(Testimony of Edward Herzinger.)

Q. Do you remember who was there, who you talked to?

A. There were quite a few people there. Just off-hand—my help that was working there.

Q. Who would that be?

A. Mr. and Mrs. McLean—I couldn't say about Mr. McLean, I know Mrs. McLean was there down by my cabin. I spoke to her. Mr. Odermatt was there and there were people there from San Juacinto, but I wasn't acquainted with them. The helpers around there were around the premises there too.

Q. Referring to this sketch, Mr. Herzinger, that Mr. Moseley [249] drew, can you tell us whether or not these lines along the south side of what is called the bar room properly show the bar room? Is that about right? A. That is about right.

Q. And the lunch counter is the line immediately on the east? A. That is right.

Q. And what is up here in the southwest corner of the bar?

A. There was a small cigar and candy case right there.

Q. Does it go right up against the west wall of the bar?

A. Yes, it did, the candy case went right against the wall.

Q. The opening then——

A. Is between the candy case and the bar.

Q. What about the cooling machine, Mr. Herzinger? What refrigeration did you have on these

(Testimony of Edward Herzinger.)

premises? A. I had one in the bar room.

Q. What kind was it, Mr. Herzinger?

A. It was about a 24-foot electric refrigerator.

Q. Where was it located?

A. That was located against the wall there, between the two long bars that you see on the south side.

Q. South side of the bar room? A. Yes.

Q. Did you have any other refrigeration, cooling machines?

A. I didn't have any other in use. I had an old one that I [250] had back in the corner by the candy case and when I put this one in I moved it over in the corner of the room to get it out of the way.

Q. Is this the kerosene or coal oil one we have heard so much about?

A. Yes, a kerosene refrigerator.

Q. You say the one you had in the bar was the only refrigerator, cooling machine, in operation?

A. That's right.

Q. This kerosene refrigerator, Mr. Herzinger, was it operating at the time of the fire?

Mr. Halley: How does he know? He wasn't there.

A. It has never been in operation——

Mr. Daly: I will withdraw the question.

Q. Do you know, Mr. Herzinger, whether or not the kerosene refrigerator was in operation on the day of the fire?

Mr. Puccinelli: The same question; objected

(Testimony of Edward Herzinger.)

to on the same ground—contrary to the evidence. He says he wasn't there.

The Court: I don't see much sense in asking the question if he wasn't there before the fire, but he can answer it.

Q. I just asked if you knew, Mr Herzinger.

A. Being I wasn't there, I couldn't swear to it, but it hasn't been.

Q. That's fine. Now did you have any ice box?

A. I had a box, possibly, oh, 20, between 20 and 25 foot ice box in what we call the lean-to back of the grocery store.

Q. Did you have any other iceboxes?

A. A large box underneath the beer counter, the back of the bar.

Q. The beer counter is part of this bar, is that right?

A. It wasn't part of the bar. That cooler is separate from the bar.

Q. But what about this beer counter you spoke of?

A. I mean the bar, that is what I mean. This cooler was underneath that and beside that was a small Coca-Cola box. It wasn't an ice box. We used ice in it.

Q. This kerosene refrigerator, Mr. Herzinger, you say it had been in the bar?

A. It had been in the bar when I first bought the place.

Q. Do you know about when it was moved?

(Testimony of Edward Herzinger.)

A. I would say some time about the middle of the summer, as near as I can recall.

Q. Middle of the summer of what year?

A. Of '46. Just as soon as I bought my electric refrigerator, I moved it out. That was the reason for buying the electric. I bought the place with what you might call no refrigeration.

Q. Did you make a sign of any kind and place on the refrigerator? A. Yes, I did. [252]

Q. What did the sign say?

A. I first put a sign up and hung it on the door handle of the refrigerator, \$150, and it didn't sell for that so later on in the winter, or possibly around New Year's, I took that sign and put another one, \$100, and it still didn't sell, still was in the grocery store.

Q. So far as you know, Mr. Herzinger, from the time the refrigerator was moved into the grocery store, was it ever in operation?

A. As far as I know, it never was. It was just stored there among the rest of the boxes.

Q. Now, Mr. Herzinger, after this fire did you make an attempt to determine what property you had, other than buildings, which were destroyed by the fire? A. Yes, I did.

Q. And did you make a list of those items?

A. Yes.

Q. And when did you make the list?

A. Oh, approximately within a week after the fire.

Q. Do you have that list? A. Yes, I have.

(Testimony of Edward Herzinger.)

Q. Do you have it with you? (Witness produces paper.) Did you also at that time estimate the value of the different items? A. Yes, sir, I did.

Q. And I will ask you, Mr. Herzinger, if you have had experience [253] in buying and selling items such as those which were in it and lost by the fire?

A. I have had about ten years' experience buying and selling equipment of that kind in various places.

Q. When did you prepare that list, Mr. Herzinger?

A. Oh, possibly within a week after the fire.

Q. And by refreshing your memory from that list, can you tell us what property you had in or about the buildings which was destroyed by fire and your best estimate of the value of that property?

Mr. Puccinelli: Any testimony of that will be objected to. Might I inquire just one question?

The Court: Yes.

Q. (By Mr. Puccinelli): From what source did you get the information contained on that list?

A. From my knowledge of knowing what the value of these different items were.

Q. Were you there the day of the fire?

A. Yes, sir.

Q. Prior to the fire had you made an inventory of what you had on the premises?

A. No, I wasn't there prior to the fire. I was there after the fire.

Q. Then from what information or source did

(Testimony of Edward Herzinger.)

you get the information as to commodities which you lost in the fire? [254]

A. Well, I practically moved all these items into that place, outside if they were in there when I bought from Brown.

Q. That was in what year?

A. That was in '46.

Q. 1946? A. Yes.

The Court: What is the question?

(Last question by Mr. Daly read).

The Court: Do you make an objection to the question?

Mr. Puccinelli: I am simply attempting to ascertain whether or not he made this from his own recollection or was assisted by any one in making it?

The Court: I think you can bring all that out on cross-examination of the witness, Mr. Puccinelli.

Mr. Daly: Now do you know what the question is, Mr. Herzinger?

(Question read.)

A. Yes, sir, I can.

Q. Will you do that for us? Just take the separate items.

A. You mean all the items I have here and their value?

Q. Yes.

The Court: That isn't the question.

Mr. Halley: I think we are entitled to examine on the list, how it was made.

The Court: I don't believe his interpretation of the question is correct. Let us get the question. [255]

(Testimony of Edward Herzinger.)

(Question read.)

Mr. Halley: The witness now proposes to read from the list, your Honor, and we object to that without having the privilege of knowing from what information he made the list.

The Court: I think so. Go ahead, Mr. Puccinelli.

Q. (By Mr. Puccinelli): What was the source of information you had in the preparation of that list? A. From my knowledge.

Q. Do you know of your own personal knowledge that at the time the fire started at Mineral Hot Springs that every item contained on that list was absolutely in or about your premises?

A. It has always been there. I don't see——

Q. I asked you, Mr. Herzinger, if you know, of your own personal knowledge, that between the hours of twelve and one o'clock on the 3rd day of May, 1947, every item contained on that list was in your premises at Hot Springs?

The Court: I think before going into the question of value, wouldn't it be better to find out from the witness what was in the place? That might simplify this situation. It is a double question.

Q. (By Mr. Daly): Will you tell us then, Mr. Herzinger, what items of personal property were in and around the premises at the time of the fire?

Mr. Puccinelli: Same objection. He can't testify to that; he wasn't there. [256]

The Court: Well, he generally knows the place

(Testimony of Edward Herzinger.)

and we have testimony in the record he was there once a week. I wouldn't entertain an objection on that ground. Let us go ahead.

Q. Read just the items.

Mr. Vargas: Again apparently this memorandum is going into evidence, reading from the items. As I understand, this memorandum was prepared by this witness and not from any information or record kept, but solely his own recollection, and I submit his use of this memorandum, under the circumstances, is that of self-serving document. The proper foundation has not been laid for the use of the document and I object on that ground. If he has an independent recollection, he may advise what was there.

The Court: What is the question?

Mr. Daly: I will withdraw that question.

Q. (By Mr. Daly): I wish you would tell us, Mr. Herzinger, what items of personal property were in and around the premises at the time of the fire.

The Court: Tell us without that document.

A. It is two years ago. It is hard for me to remember all of them.

The Court: Do the best you can, Mr. Herzinger.

A. I know there was a candy case and cigar case combined. Then there was a large back bar with mirrors in it. [257]

Q. Wait a minute—candy case and what?

A. Candy case and cigar case combined.

Q. What was the next item?

(Testimony of Edward Herzinger.)

A. A back bar with large mirrors. There was a front bar.

Q. How long was this back bar, if you remember?
A. Approximately 20 feet.

Q. And the candy case and cigar case?

A. The length of that?

Q. Yes.
A. Approximately five feet.

Q. And the front bar, how long was it?

A. That is twenty feet. And underneath that front bar was a cooler that held 25 cases of beer, had a large three-compartment and stainless steel sink for washing glasses; and a large electric refrigerator, 25-foot size.

Q. Is that 25 cubic feet?
A. Yes, sir.

Q. What make was it, if you remember?

A. I just couldn't tell you what make that was.

Then there was a small Coca-Cola cooler for ice. There was a 20-foot lunch counter and there was a butane gas stove in the lunch room. Then there was a 3-compartment sink there for washing dishes and there was two tables back of the lunch counter that we used to work on and there was a cash register back of the lunch counter and a cash register back of the large bar that I mentioned [258] a little while ago. And there was possibly fifteen large pictures of scenery that I had painted and hung on the wall.

Q. How large were those pictures, do you know?

A. Possibly two feet by three feet, to my best recollection. And there was eight deer heads mounted deer heads, on the wall. There was nine of these—I would call them overstuffed—stools, high

(Testimony of Edward Herzinger.)

stools, at the bar, with padding on the top. There were four of them high stools without any padding, just wooden stools. There was a panarama picture machine I had in there and I had a piano in there. There was a large bench that I had along the wall there, kind of a leatherette bench for people to sit on. There was a 21 table there that they played 21 on, and then there was a poker table there, and a round dining room table, about six chairs.

Q. What were those, just straight chairs?

A. Just ordinary wood chairs, yes. Then there was a two-burner fuel oil stove.

Q. Was that a heating stove?

A. Yes. There was a crap table there. There was a luminal lighting fixture above the crap table, and Wurlitzer music machine; four slot machines.

Q. What denomination were those machines?

A. Five cent, ten cent, a twenty-five cent and a fifty cent. Then a bench where these four slot machines set on top. [259]

The Court: We will take a recess now until 10:00 o'clock tomorrow morning.

Friday, February 10, 1950, 10:00 A.M.

(Presence of the jury stipulated.)

(All attorneys present.)

EDWARD HERZINGER

resumed the stand on further

Direct Examination

By Mr. Daly:

Q. The last item I believe you mentioned, Mr. Herzinger, was the bench under the slot machines. Now can you go on from there and give us some more of the items which were in the building? I notice that most of these items apparently are in the bar room. Perhaps it would be clearer to all if you gave the rest of the items in the bar, as well as you remember.

A. Well, had cooking utensils and silverware and dishes. Had an electric mixer there. Had a stapler, had a panarama kit, two toilet fixtures, some tapestry and Christmas decorations; a safe——

Q. Just a moment—now if you will proceed please.

A. And one lavatory and a towel cabinet; one burglar alarm system; complete set of fire extinguishers; about six panarama films; a two-wheel beer cart; beer glasses and glasses of all sorts used in connection with the bar. Then there was the grocery counter——

Q. You are now going into the grocery store?

A. The grocery store. [260]

Q. What type of counter was that, Mr. Herzinger? A. What was it made out of?

Q. Yes, do you know about how big it was or what it was made of?

A. It was a wooden counter, possibly 18 feet long.

(Testimony of Edward Herzinger.)

Q. That is the grocery counter?

A. Yes. And there was the back grocery counter with its shelves and drawers all complete, and a grocery scale; that used kerosene refrigerator. Back in that lean-to we had a large ice box, two cream cans; flood light bulbs for flood light outside; also colored bulbs for identification when you went out to the canopy. Back of the oil house there was two barrel pumps, one air pressure, a large vise; two hydraulic jacks; an assortment of tools; a vulcanizing set; also two gas lamps—possibly in the other part of the building. Now going back to the cabin, there were two bed springs and mattresses, also bedding; there were two alarm clocks; one fuel oil stove; there were two coal stoves—they weren't in the cabin, they were in another part. There was also about \$400 worth of personal belongings of various kinds in that cabin. I had a half-horse compressor in that ice box.

Q. That was in the basement?

A. That was down the basement, yes.

Q. Was there anything else in the basement that you remember besides stock in trade? [261]

A. Complete network of piping that we put in there shortly before the fire. There was a hot water tank; one small table. At the pump house there was a small electric light plant.

Q. Is that the one you were using?

A. No, that was a spare. That was a small one, just in case the other one went out; and there was a water pump, a bunch of garden hose.

(Testimony of Edward Herzinger.)

Q. Did you have an adding machine?

A. Yes, sir, I had an adding machine too. That was in the bar room.

Q. And did you have any spare parts for your Delco Diesel plant?

A. Yes. That was generally kept in the grocery store on the shelf there, small delicate parts for the Diesel.

Q. Did you have some spare pipe connections?

A. Yes, I did. It was down in the basement.

Q. Did you have any containers for fuel oil?

A. Had two for fuel oil stove.

Q. Two of those?

A. Yes, partly filled with fuel oil.

Q. Did you have any cleaning equipment?

A. Had brooms, push brooms and other brooms, and mops, mop fillers.

Q. Can you think of anything else, Mr. Herzinger?

A. Right off-hand I can't. There were a lot of small miscellaneous parts. [262]

Q. Let's go back over these then, Mr. Herzinger, and I wish you would give us your best estimate on the value of these different items as you gave them, to you as of the date of the fire. The first one is the candy case and the cigar case.

A. That was worth approximately \$30.

Q. And the back bar with the mirrors?

A. That would be approximately \$1,200 for that type of back bar.

Q. And the front bar?

(Testimony of Edward Herzinger.)

A. That would be about \$300.

Q. And then you said you had a large cooler that held 25 cases of beer?

A. That would be about \$200.

Q. You are not including any beer in there? That is for the cooler itself?

A. No, the cooler with the coils in it.

Q. And then you said you had a 3-compartment stainless steel sink back of the bar.

A. That would be about \$105.

Q. And then you said a Coca-Cola cooler?

A. Oh, approximately \$40.

Q. And then a 20-foot lunch counter?

A. Approximately \$45.

Q. And butane gas stove in the lunch portion or back of the lunch counter?

A. About \$265. [263]

Q. And then I believe you said you had a 3-compartment sink in back of the lunch counter?

A. About \$110.

Q. And then you said you had a cash register in the lunch counter, or back of the lunch counter?

A. That one in the lunch counter would be approximately \$100.

Q. And a cash register for the bar?

A. That would be about \$200.

Q. Now did you have another cash register besides those two?

A. I had one in the grocery store.

Q. About what was that worth, if you remember?

A. Approximately \$150.

(Testimony of Edward Herzinger.)

Q. And then I believe you said you had 15 large pictures, about 2 by 3 feet. What were they worth at that time?

A. They were worth about \$5 apiece; would total up some \$75.

Q. And you had some deer heads, I believe?

A. They were worth approximately \$400 for the deer heads.

Q. And then you said, I believe, that you had nine bar stools that were padded?

A. They were \$20 apiece, total approximately \$180.

Q. And then four bar stools which were not padded, just wooden stools?

A. Possibly worth about \$35.

Q. Panarama picture machine?

A. That would be \$500. [264]

Q. And a piano? A. Approximately \$250.

Q. And then a large leatherette bench?

A. Approximately \$20 on that bench.

Q. And 21 table? A. That was about \$30.

Q. And a poker table?

A. Approximately \$20.

Q. And a round dining table?

A. Approximately \$15.

Q. Six chairs? A. About \$35.

Q. Two burner fuel oil heating stove?

A. That was worth \$200.

Q. And a crap table?

A. Approximately \$450.

Q. Aluminal lighting fixture above the table?

(Testimony of Edward Herzinger.)

A. About \$35.

Q. And I believe you said you had a Wurlitzer music machine? A. About \$350.

Q. And four slot machines, 5, 10, 25 and 50?

A. Worth approximately \$1500.

Q. And a bench under the machines?

A. Approximately \$25.

Q. Then beginning this morning you said you had a set of cooking [265] utensils, dishes, and so forth?

A. About \$125 to replace the equipment.

Q. And an electric mixer?

A. That is about \$40.

Q. And then a stapler?

A. About \$3.50.

Q. A panarama kit?

A. That was \$75.

Q. And two toilet fixtures?

A. Approximately \$75.

Q. And tapestry, wall tapestry and Christmas decorations in the bar.

A. Approximately \$75.

Q. You said you had a safe?

A. About \$50.

Q. And a lavatory? A. About \$25.

Q. Towel cabinet?

A. About \$20, I think, with the towels and cabinet complete.

Q. And then a burglar alarm system?

A. That run in the neighborhood of \$85.

(Testimony of Edward Herzinger.)

Q. Then you said you had a set of fire extinguishers? A. About \$225.

Q. Six panarama films? [266]

A. In the neighborhood of \$35 to \$50 apiece; approximately \$200 for the six of them.

Q. And a two-wheel beer cart?

A. Approximately \$16.50 on the beer cart.

Q. And then beer glasses and glasses of all kinds for the bar?

A. Approximately \$125 worth of glassware.

Q. And then the grocery counter?

A. Oh, approximately \$50.

Q. And the back grocery counter, shelves and drawers? A. Approximately \$75.

Q. The grocery scales?

A. I would say about \$65.

Q. Used kerosene refrigerator?

A. Well, I had a for sale sign on there for \$100. I believe it was worth \$100 at that time.

Q. Now this large icebox that was in the lean-to of the grocery store?

A. That would be about \$25.

Q. And you stated you had two cream cans in there?

A. Well, the cream cans would be worth, oh say \$5 apiece, \$10, and I must have had about \$13 worth of lighting bulbs.

Q. That is the flood light bulbs and the colored bulbs? A. Yes.

Q. I believe you said you had two barrel pumps in the oil house? [267]

(Testimony of Edward Herzinger.)

A. They run about \$20 apiece, \$40 for the two of them.

Q. And an air compressor?

A. Possibly \$175.

Q. I believe you said you had a large vise in there? A. Approximately \$40 for the vise.

Q. And two hydraulic jacks?

A. \$15 apiece—\$30 for the two.

Q. And then tools of all kinds?

A. I would say, oh approximately \$85 worth of tools.

Q. A vulcanizing set?

A. In the neighborhood of \$16.

Q. And two gas lanterns, I believe you said?

A. The two would be about \$21.

Q. And then there were bed springs, mattresses and bedding in the cabin? A. Probably \$115.

Q. Two alarm clocks?

A. About \$2 apiece, \$4 for the two.

Q. And then a fuel oil stove in the cabin?

A. Approximately \$75.

Q. And two coal stoves?

A. They would be worth about \$65.

Q. For the two of them? A. Yes, sir.

Q. Were they in use? [268]

A. They weren't in use, were stored.

Q. And a half-horse power compressor?

A. That would be about \$300.

Q. And I believe you said there was a network of piping in the basement?

A. That would be approximately \$150.

(Testimony of Edward Herzinger.)

Q. And you said you had a hot water tank down there? A. That would be about \$135.

Q. And a small table in the basement?

A. Oh, approximately \$5 for the small table.

Q. And a small electric light plant, the one which was not in use except for emergency?

A. Approximately \$250.

Q. And water pump?

A. Approximately \$100 for that water pump.

Q. And then some garden hose?

A. Approximately \$10 for the garden hose.

Q. Your adding machine, what was that worth?

A. Approximately worth \$65.

Q. And then your Diesel plant—those were Diesel parts, I believe.

A. Approximately, oh, \$18 worth of Diesel parts there.

Q. And pipe connections?

A. Approximately \$75 of pipe connections.

Q. I believe you said you had two oil barrels that were partly [269] filled with oil?

A. Around \$15.

Q. For the two?

A. For the two of them with oil.

Q. Some mops and brooms?

A. Approximately \$15.

Q. Could you estimate the total values which you have stated for these various items?

A. Oh, I estimated around \$10,900.

Q. That is approximately the total of these figures which you have given us here?

(Testimony of Edward Herzinger.)

A. Yes, sir.

Q. Are those your best estimates of the values of the different items at the date of the fire?

A. Yes, sir, they are.

Q. There has been some talk, Mr. Herzinger, about the amount of money which was there in these buildings in the various containers at the time of the fire. Do you, of your own knowledge, know how much money there was there? Of your own knowledge do you know? A. No, I don't.

Q. Can you tell us how much you customarily left at the place for operating capital?

Mr. Halley: I object to that, your Honor. The witness has testified he has no knowledge as to what money was [270] there and what he customarily left there is no proof what was there the day of the fire.

The Court: Objection sustained.

Q. Do you remember, Mr. Herzinger when you were last at the premises before the fire?

A. Oh, it was approximately ten days before the fire. I went there the day before, I stopped there and unloaded some merchandise, but I didn't check on anything or do any of my business at that particular trip, because I was on my way to Elko.

Q. You didn't pick up any money and leave any certain amount?

A. No, I just stopped long enough to see what was going on there and unload my load and I went to Elko.

Q. Do you know how long it had been since you

(Testimony of Edward Herzinger.)

had picked up the money and left a certain amount there for operating capital?

A. Well, that was approximately ten days.

Q. And do you know the amount of money that you left there at that time?

A. I have a very close recollection of how much I had there.

Q. What is your best recollection?

Mr. Halley: I object to that your Honor. Ten days before the fire is no proof the day of the fire—this money is fluctuating and it is shown in the evidence it has fluctuated from time to time.

The Court: Objection sustained.

Q. You heard Mr. Moseley's testimony, didn't you, Mr. Herzinger, [271] concerning the amounts of money that were, in his estimation, in the different containers on the premises at the time of the fire?

A. Yes, I did.

Q. Do you know of any other monies that were on the premises at the time of the fire?

A. Besides what he has mentioned?

Q. Yes. A. Yes, I do.

Q. What monies are those?

A. The money they put in——

Mr. Halley: May we inquire first before he answers that?

The Court: You may do so.

Q. (By Mr. Halley): I understand, Mr. Herzinger, the last time you knew of any money on the premises was ten days before the fire, is that correct?

(Testimony of Edward Herzinger.)

A. That is the last time I took money from there for banking purposes.

Q. In other words, you made no count of the money except ten days prior to the fire, is that right?

A. That's right.

Q. So what money was there at the date of the fire you would only know from what you have heard from some one else, isn't that true? [272]

A. That's right.

Mr. Halley: We object to the testimony, your Honor, being purely hearsay.

The Court: This witness is just testifying as to the amount of money which some one told him——

Mr. Daly: I don't believe that is quite correct. I believe if I can ask another question I can clear it up.

Mr. Halley: Is the present question withdrawn?

Mr. Daly: Yes, I will withdraw that question.

Q. (By Mr. Daly): I will ask you, Mr. Herzinger, if after the fire you recovered any mutilated coins or mutilated silver? A. I did.

Q. And I will ask you what you did with it?

A. I put it all in a box and took it to the Fidelity Bank in Twin Falls.

Q. Where did you find it in the remains of the fire, if that is where you found it?

A. I found some in each of the three cash registers, and I found some in each of the four slot machines, and I found money in the three different fishing tackle boxes.

Q. Now were there mutilated silver or mutilated coins in all four slot machines? A. Yes.

(Testimony of Edward Herzinger.)

Q. I will ask you, Mr. Herzinger, how much money it took to load the slot machines; in other words, place them in operation? [273]

A. Well, then four slot machines of that denominations would take right close to the neighborhood of \$300, I think, and the jack pots.

Q. Who had the keys to those slot machines?

A. I was the only one that carried the keys.

Q. I will ask you when was the last time you cleaned the excess money out of the machines?

A. About ten days prior to the fire.

Q. I will ask you if, from your knowledge of slot machines, there would be in excess of \$300 in those machines at the time of the fire?

Mr. Vargas: We object to that—it calls for obvious pure assumption and conclusion of this witness.

The Court: Let me have the question.

(Question read.)

The Court: Objection will be sustained.

Q. Mr. Herzinger, how long have you been operating slot machines as an owner of machines?

A. Oh, possibly six or seven years prior to the fire.

Q. And have you opened the machines and taken the money out during that period? A. Yes.

Q. And you are familiar with the general operation of slot machines? A. I am. [274]

Q. How long had you been operating these particular four slot machines?

(Testimony of Edward Herzinger.)

A. Oh, possibly nine months.

Q. And were you familiar with their operation?

A. I was.

Q. Being familiar with the operation of these machines, can you predict with a reasonable degree of accuracy what money will be in a machine over a certain period? A. Yes, I could.

Q. Now I will ask you, Mr. Herzinger, based upon your experience in operating slot machines generally and in operating these machines, if you can say that there would be in excess of \$300 in these four slot machines at the time of the fire?

Mr. Vargas: If the Court please, again we object to that on the same ground.

The Court: Objection sustained.

Q. I believe you said, Mr. Herzinger, that you picked mutilated silver out of the slot machines?

A. Yes, I did.

Q. How did you get it out?

A. I had to break the machines to get the mutilated silver out.

Q. And could you tell, when you were breaking up the machines, where the money was in the machines, where the money had been?

A. Each had its own compartment in the machine.

Q. Is there only one place in a slot machine where you found [275] mutilated coins or mutilated silver?

A. No, there are three places.

Q. What are those?

(Testimony of Edward Herzinger.)

A. The back part and there is the tube and the cash box.

Q. And in how many places did you find mutilated silver or mutilated coins in the five-cent machine? A. In three of the places.

Q. And in the ten-cent machine?

A. In three of the places?

Q. And twenty-five cent machine?

A. In all three of the places.

Q. And the fifty-cent machine?

A. Also in all three of the places.

Q. I believe you said you put all the mutilated coins and mutilated silver in a box. What did you do with it then?

A. I took it to the Fidelity Bank in Twin Falls.

Q. And were you ever paid for that mutilated coin and mutilated silver?

A. I got some returns for it.

Q. Do you know how much?

A. Oh, a little over \$500.

Q. You received that? A. Yes.

Q. Did that mutilated coin and mutilated silver which you took to the Fidelity Bank in Twin Falls include all of the mutilated [276] coin and silver from the slot machines, from the three cash registers and from the two cash boxes? Was it all that you found? A. Yes, that was all.

Q. Do you know whether or not all or a part of that was paid at a bullion rate?

A. Some was paid at a bullion rate.

Q. You don't know how much?

(Testimony of Edward Herzinger.)

A. Not exactly. I think I have a ticket showing what it was from the bank.

Q. Mr. Herzinger, do you have any complete list of your stock of merchandise at the time of the fire? A. You mean inventory sheets?

Q. An inventory of what you had at the time of the fire?

A. I wouldn't have an inventory exactly at the time of the fire.

Q. When did you take the last inventory prior to the fire? A. Well, on January 4th.

Q. Of what year? A. Of '47.

Q. Now did you receive invoices for merchandise purchased during the period from January 4th until the fire? A. Yes, I did.

Q. Do you have those?

A. No, I don't. [277]

Q. Do you know where they are?

A. They were burned up in the fire.

Q. Were any records kept showing the sales that were made during the period from January 4th to the time of the fire?

A. There were records kept.

Q. And do you have those? A. No, sir.

Q. Do you know where they are?

A. They went up with the flames with the rest of the stuff.

Q. Did you make any effort after the fire to determine what purchases you had made during that period between January 4th and the time of the fire?

A. Yes, I did.

(Testimony of Edward Herzinger.)

Q. What efforts did you make?

A. I went to the various wholesale houses that I have been buying from and they gave me a copy of the invoices that I lost in the fire.

Q. Is that the only information you have?

A. That is about the only information I have.

Q. Do you know from your observation and from the inquiries that you made, from your knowledge of what purchases were made, whether your inventory was larger or smaller at the time of the fire than it was on January 4, 1947?

A. I would say it was larger.

Q. Do you have any idea how much? [278]

A. Approximately a thousand dollars, somewhere in there.

Q. Mr. Herzinger, how was that inventory on January 4, 1947, taken? Who took it?

A. I called out the items myself from the shelves and various places.

Q. And was that written down?

A. Yes, sir.

Q. Who wrote it down?

A. My sister-in-law.

Q. Are you familiar with her handwriting?

A. I am.

Q. Handing you Plaintiff's Exhibit marked 11 for identification, I will ask you if that is the inventory of January 4, 1947?

A. Yes, sir, that is the inventory I took January 4th.

Q. And this sheet that is glued to the front, is

(Testimony of Edward Herzinger.)

that an adding machine tape that represents the total of the inventory on that date?

A. Yes, it does.

Mr. Daly: I will offer Plaintiff's Exhibit No. 11 in evidence.

Mr. Vargas: May I inquire?

Mr. Daly: Surely.

Q. (By Mr. Vargas): In whose possession has this document, Exhibit 11 for identification, been retained? [279] A. In mine.

Q. And where have you kept it?

A. I have kept it in the safe at home.

Q. By home do you refer to the Mineral Hot Springs?

A. In my home. I am referring to my land and stock ranch at Buhl, Idaho.

Q. Did you take it there shortly after it was made?

A. Right soon after it was made, I did. As soon as I got home with it.

Q. Do you have any other records of this business of the Mineral Hot Springs that are retained at your ranch? A. I have.

Q. But you had none of the actual books of this business? They were destroyed in the fire, I understand?

A. Well, for the period of that year before the fire they was destroyed. I had previous records.

Q. Was your general office in connection with your business enterprise maintained at the ranch, Mr. Herzinger? A. Part of it was.

(Testimony of Edward Herzinger.)

Q. Did you make payment in connection with purchases for the Hot Springs business from the ranch? In other words, do you have at your ranch any check-book records relating to business of the Mineral Hot Springs from the first of January, 1947, to the time of the fire?

A. You mean during the year of '47? [280]

Q. Yes, from January up to May?

A. I have some cancelled checks there, if that is what you mean.

Q. What generally would those be, Mr. Herzinger, cancelled checks you have in the ranch? Would they relate to purchases for groceries in your store business, or what?

A. Well, there would be some for groceries and other expenses, wages.

Q. Now the figures that are contained on this Exhibit 11 for identification, what would be your best recollection as to whether they are wholesale or retail figures?

A. The retail figures are in a different column. They are segregated.

Q. There seems to be only one column of figures on page one.

A. They would represent the wholesale price on that page there.

Q. Now there are some partial figures in the two columns on the first side of sheet one.

A. These would be the retail ones and them is the wholesale.

Q. Referring to the column of figures closest to

(Testimony of Edward Herzinger.)

the center of the sheet, you say those are retail figures? A. Yes, sir.

Q. The column of figures near the outside of the sheet represent wholesale? A. Yes.

Q. Is that true throughout the exhibit, that same situation? [281] A. I think it is.

Q. Will you take a look and tell me whether or not that is the case?

A. It would take rather a long time to go over each article separately, but I would say that this column closest to the right is the retail price and the next column is the wholesale price.

Q. Referring to the next column, I mean the column toward the right outside of the pages as the document is held and you are looking at it?

A. Yes.

Mr. Vargas: For what it is worth, if the Court please, I do not think we have any objections.

Mr. Platt: I have no objection.

The Court: It may be admitted in evidence, Exhibit 11.

Q. (By Mr. Daly): Mr. Herzinger, with reference to wholesale and retail prices, I will ask you to examine Plaintiff's Exhibit No. 11 and have you tell us if, where prices are shown retail, any discount is made in the figure which is used to obtain the total amounts you have incorporated?

A. Yes, there is.

Q. And did you have a uniform mark-up on your grocery items? A. Yes, we did.

Q. What was that mark-up?

(Testimony of Edward Herzinger.)

A. Twenty-five per cent. [282]

Q. Did you discount the 25 per cent from the retail prices shown there in determining your totals as of January 4, 1947? A. I did.

Q. Will you tell us what your total inventory on January 4, 1947 was? You may go to my exhibit.

A. \$15,767.69.

Q. From this inventory, Mr. Herzinger, and from your observations and knowledge of purchases, what then would be your best estimate of the inventory on hand at the time of the fire?

Mr. Halley: We believe, your Honor, that has already been asked and answered. He said his best estimate was it was a thousand dollars more than it was on January 4th.

The Court: I believe so.

Q. Now, Mr. Herz, in addition to these buildings shown on here and their contents, was anything else destroyed by the fire? A. Yes, there was.

Q. What else?

A. There was a trailer house sitting right behind the building that is shown down there marked "T."

Q. Was that your trailer house? A. Yes.

Q. What kind of trailer house was it, do you know? A. That would be hard to describe.

Q. Did it have a trade name? [283]

A. No, it had no trade name.

Q. Do you know its approximate value at the time of the fire? A. Yes, I do.

(Testimony of Edward Herzinger.)

Q. And what is your best estimate of its value at the time of the fire?

A. One thousand dollars.

Q. I ask you, Mr. Herzinger, who owned the tanks and the pumps which were at the station at the time of the fire?

A. The Standard Oil Company of California.

Q. Did you pay rent on those? A. Yes.

Q. In connection with the buildings, Mr. Herzinger, did you have any fire insurance coverage the date of the fire? A. I had some.

Q. Did you make any recovery from your fire insurance carried? A. Yes, I did.

Q. As a condition to that recovery, Mr. Herzinger, were you required to agree and assign the amount recovered from them from anything you might recover in this action? A. Yes, sir.

Q. And what was the amount that you recovered?

A. Four thousand dollars.

Q. How much? A. Four thousand dollars.

Q. Was that all the insurance you had on the buildings involved? [284]

A. Yes, it was.

Q. Did you have any more coverage on the buildings which were not destroyed? A. Yes.

Q. How much total coverage was there on the premises at that time? A. Five thousand.

Q. And your recovery was four thousand?

A. Yes.

Q. Now, Mr. Herzinger, I will give you Plaintiff's Exhibits No. 1 and No. 2 and No. 3 and No. 4

(Testimony of Edward Herzinger.)

and ask you to examine them and tell us whether or not they represent the typical or the formal way in which your business with Standard Oil was handled at about the time and prior to the fire?

Mr. Platt: That is quite a comprehensive question.

Mr. Daly: It perhaps is too much so.

Mr. Platt: Yes, I don't understand it quite.

Mr. Daly: I will withdraw it and ask several simpler ones that will perhaps be better.

Q. I hand you Plaintiff's Exhibit No. 1, Mr. Herzinger, and ask you what is it?

A. That is an invoice on gasoline that the truck driver makes when he delivers gasoline.

Q. Was that a typical invoice for the petroleum products delivered [285] by Mr. Odermatt or one of his helpers to your station at that time?

A. It was.

Q. Mr. Herzinger, what is Plaintiff's Exhibit No. 2?

A. That is acknowledgment of delivery receipt given for the credit cards for gasoline. When the truck comes up with gasoline, makes deliveries, we turn the credit cards to him and he credits them on this slip and takes them from the total and takes them at face value the same as money.

Q. Is that typical of the way you handled credits for merchandise that you delivered on credit cards at that time? A. Yes.

Q. What is Plaintiff's Exhibit 3, Mr. Herzinger?

A. That is a check made out to the Standard Oil

(Testimony of Edward Herzinger.)

Company for the amount of \$180.82, payable for gasoline delivered at my place.

Q. And is that the typical and formal way in which you made payments to the Standard Oil Company? A. It was at that time.

Q. What is Plaintiff's Exhibit No. 4, Mr. Herzinger?

A. Well, it is either invoice or slip for rent on the pumps and tanks that are paid to the Standard Oil Company.

Mr. Platt: May I see that?

Mr. Daly: Yes.

Q. Was that the formal and typical way by which you paid or [286] receipted for rent paid the Standard Oil at that time? A. Yes.

Q. Then is it correct to say, Mr. Herzinger, that these four exhibits represent generally the typical method by which you were doing business with the Standard Oil Company of California at and prior to the fire? A. Yes.

Q. Now after this fire, Mr. Herzinger, did you continue in business? A. After the fire?

Q. Yes. A. Not for a few days.

Q. Well, what did you do right after the fire with reference to continuing in business?

A. I went to a cabin right back of the place there and installed a small bar in there and a few pieces of equipment on the place there, just about 10 by 12, and started to operate in that cabin.

Q. Can you show us, Mr. Herzinger, on here about where that cabin would be?

(Testimony of Edward Herzinger.)

A. It would be down below—judging by the scale here, I would say it would be just about in this position here.

Q. And do you know about how far that is from the highway?

Mr. Vargas: For the purpose of the record, will you identify the phrase “in this position.” He is pointing to an [287] area at the back of the black-board.

Q. Is the cabin which you are speaking of, Mr. Herzinger, located directly east from the northeast corner of the bar room? A. Yes.

Q. And how far about?

A. I would say about 100 feet.

Q. East? A. Yes.

Q. How far would that be from the highway, do you know, Mr. Herzinger?

A. I guess it would make that about 225 feet from the oil.

Q. From the oil? A. Yes.

Q. How soon after the fire did you get set up in this cabin?

A. I would say about six or seven days.

Q. What business were you able to do there?

A. Very little.

Q. What did it consist of?

A. You mean the merchandise?

Q. Yes, what did you have to sell generally?

A. We had a little beer and soft drinks and liquor.

Q. Any groceries?

(Testimony of Edward Herzinger.)

A. Very little groceries. We had some bread and supplies brought down. There might have been a few articles of groceries [288] but very few.

Q. Did you have any slot machines?

A. As near as I can recollect, I had two other slot machines that I took down there.

Q. Did you have any bar facilities?

A. I had a small bar there.

Q. What about gambling facilities?

A. There was none.

Q. How long did you remain in this cabin as far as the business was concerned, if you remember?

A. My best recollection it might have been sixty days.

Q. And did you do anything in the meantime to get better or larger facilities for your business?

A. I put a small building, built rather a small building, over the pump where the pump house burned down, which was a little larger than the present place, and moved into that.

Q. A little larger than the present place, what do you mean? A. That little cabin.

Q. A little larger than the cabin? A. Yes.

Q. Was it nearer the highway?

A. I would say it was a hundred feet closer to the highway.

Q. And did you move into that within about sixty days? A. To my best recollection.

Q. What, if any, efforts did you put forth to get a permanent [289] building where the buildings had been destroyed?

(Testimony of Edward Herzinger.)

A. Well, I had a caterpillar come in there and dig out a larger basement than there was before. Prior to that we had to clean out all the burned rubbish and cache everything, the remains.

Q. Who did that work, Mr. Herzinger, if you remember?

A. A person by the name of Nelson.

Q. You hired him to do that? A. Yes.

Q. Do you remember what you paid him to do that?

A. My best recollection I think it was \$150.

Q. Was it your intention at that time, immediately after the fire, within sixty days after, to rebuild and continue your business at that point?

A. That was my intentions.

Q. You did intend——

A. To build a new place and move into a larger place.

Q. Did you do that?

A. Finally I did. In the meantime, I still had another place.

Q. Tell us about that, when you got in it.

A. Well, the school board in Contact, Nevada, were selling an old school house under sealed bids, so I put my bid in there too and I happened to get the school house, so then I hired a mover to move it down right next to that pump house building where we were. [290]

Q. Where is that with reference to this chart, where would it have been located?

A. That would have been located very close to

(Testimony of Edward Herzinger.)

the northwest corner of where you see that pump house.

Q. How big a building was this old school house?

A. Oh, approximately 20 by 24 and it had a lean-to behind it.

Q. Which gave it a little more room?

A. Yes, storage room.

Q. Would you know about when you moved into that old school house?

A. I would say sometime in July, to the best of my recollection.

Q. Of 1947?

A. Yes, possibly the latter part.

Q. What type of construction was it?

A. It was a frame building.

Q. You said you eventually did rebuild. What sort of building did you put on the premises?

Mr. Vargas: If the Court please, I do not see the materiality of that.

The Court: I don't either. What is the purpose of that, Mr. Daly?

Mr. Daly: I was only introducing this line of testimony to show the mitigation of damages to the full extent of Mr. Herzinger's ability and, of course, in connection with the [291] claimed loss of profits, the facilities which he had available in the interim before he got a place to rebuild.

The Court: Objection will be sustained.

Q. Did you commence building your new building, Mr. Herzinger, as soon as you could?

A. Yes.

(Testimony of Edward Herzinger.)

Q. And did you move into the building as soon as it was possible for you to do so?

A. Yes, I did.

Q. When did you get into your new building?

A. Oh, opened up on the 26th day of December, 1947.

Q. Mr. Herzinger, what was one of the chief sources of your income during the period shortly before the fire? Where did a good percentage of your business come from?

A. You mean the customers?

Q. Yes.

A. Oh, from the U. C. Land and Cattle Company, situated all through the valley there. San Juacinto was one of the big headquarters, H. D. headquarter ranch.

Q. When, if you know, did the U. C. Land and Cattle Company complete its operations in San Juacinto and vicinity?

A. I couldn't say for sure, but it seems to me like about the end of the year 1947, my best recollection.

Q. Was a substantial part of your business tourist trade?

A. There was a little through the summer months. [292]

Q. What months particularly, if you can remember?

A. It started in May—June, July, August, September, all through there.

Q. During the time immediately following the

(Testimony of Edward Herzinger.)

fire, Mr. Herzinger, and up until December 26, 1947, did you suffer any loss of profits by reason of the fire? A. I did.

Q. Can you tell us your best estimate, Mr. Herzinger, of what profits you lost during that period?

Mr. Vargas: It obviously calls for guess, speculation, conclusion of the witness, certainly calls for self-serving declaration on behalf of the plaintiff himself. Objected to on each of those grounds.

Mr. Daly: If the Court please, he is the owner and operator of the business and I believe he can testify as to what his loss of profits were during this period.

The Court: Any question as to loss of profits being proper.

Mr. Vargas: That is correct, but at the same time it is involving so many elements of speculation.

Mr. Daly: Those are matters for cross-examination.

Mr. Vargas: I submit it is a self-serving declaration, not predicated upon records, simply estimate and opinion of this witness—self-serving.

The Court: You might be short on the foundation there. [293]

Mr. Daly: Perhaps I can ask a few more questions.

Q. How long, Mr. Herzinger, had you operated this business prior to the fire? When did you begin operating the business?

A. The latter part of February, '46.

(Testimony of Edward Herzinger.)

Q. And did you operate it then continuously until the time of the fire? A. Yes.

Q. Do you know the approximate amount of the profits which you made during that period?

The Court: What period is that?

Mr. Daly: It is the period from the date of purchase, which was the latter part of February of 1946, until the time of the fire, which is the 3rd of May, 1947.

Mr. Vargas: If the Court please, with reference to that question, taking any profits of this business from February, '46, the witness has already testified that he had available records of this business which were created on January 4, 1947, namely, the inventory. Now there isn't anything which demonstrated, up to this point, that any records of this business for the year 1946 are not wholly available and open for inspection. We object to this line of testimony upon the ground no proper foundation has been laid for this. If there are such books and records, they are certainly the best evidence.

Mr. Daly: I will ask Mr. Herzinger about records. [294]

The Court: Very well.

Q. Do you have, Mr. Herzinger, available records which show your profits made for operating the Mineral Hot Springs from the time you purchased it, the latter part of February, until the date of this fire, the 3rd day of May, 1947?

A. I don't have them.

Q. Were there ever any records by which your profits could be determined?

(Testimony of Edward Herzinger.)

A. There were. We always kept records in all these places.

Q. What has happened to those records? Where are they, if you don't have them?

A. They were burned up in that fire.

Q. Now, Mr. Herzinger, can you estimate for us the profit which you made in operating the Mineral Hot Springs from the period between February 25, 1946, and the date of the fire, May 3, 1947? Yes or no answer—can you tell us? A. Yes.

Q. What is your estimate?

Mr. Vargas: If the Court please, prior to answer to that question I would like permission of the Court to interrogate further with reference to possible objection.

The Court: You may do so.

Q. (By Mr. Vargas): Is it your testimony, Mr. Herzinger, that everyone of the records of the Mineral Hot Springs business, save and except alone the inventory prepared on January 4, 1947, [295] was destroyed in the fire?

A. Well, practically all of it was, outside a few cancelled checks that I told you I had.

Q. In other words, the only thing apparently that you took from the business over to your ranch reflecting the condition of the business for the year 1946 was this inventory. A. My place, yes.

Q. Did you make out an income tax return for the business in 1946? A. Yes, sir.

Q. When was that made out?

A. It was finished some time between January 1st and January 15, 1947.

(Testimony of Edward Herzinger.)

Q. So you would say that your income tax return, involving this business at Mineral Hot Springs had been prepared and completed by January 15, 1947, for the year 1946? A. Yes.

Q. Your copy of that document you didn't then take over to your office at your ranch?

A. Of this income tax?

Q. Yes.

A. That is where I keep all my income tax records, at the ranch.

Q. Then you have available at the ranch the income tax record of this business for the year 1946, have you not? [296]

A. I have at the present time.

Q. That record, I take it, reflects the profits of this business, if any profits there were, during the year 1946? A. It should.

Mr. Vargas: If the Court please, I submit that there is a record prepared in the ordinary course of business, federal income tax return obtainable and demonstrating the testimony sought now to be elicited from recollection and estimate of this witness, and I object to it on the ground there is better evidence, namely, the plaintiff's income tax record for the year 1946, which is now available and under the control of the plaintiff.

Mr. Daly: I take it if we were here trying to get an income tax record introduced, counsel's objection would be offered it was not a primary entry, which was not the best evidence under those circumstances. Of course, it is a confidential document.

(Testimony of Edward Herzinger.)

Mr. Vargas: It is not in here now, when he is in here stating these things. We certainly have a right to examine what he had in his income tax return.

The Court: It would seem to me if he has a record of the profits which he claims between the two dates, no matter what form they might be in, they ought to be accounted for before he could testify as he is asked here to testify from his recollection. [297]

Q. (By Mr. Daly): Mr. Herzinger, this income tax return that Mr. Vargas has been talking to you about, what period does it cover?

A. In regard to Mineral Hot Springs?

Q. Well, was it a separate return relating only to Mineral Hot Springs?

A. No, it was combined with all my other income that I had off the ranch or various income I had had during that year.

Q. During the calendar year of 1946?

A. Yes.

Q. You don't have that with you?

A. No, sir, I don't.

Q. Did it show income separately from Mineral Hot Springs?

A. It might now, I couldn't say whether it did or not. I had them papers prepared by another party.

Q. You don't know whether it would show and whether you could determine from it the income from Mineral Hot Springs, is that right?

(Testimony of Edward Herzinger.)

A. No, I wouldn't know.

Q. Mr. Herzinger, do you know what the income from the Mineral Hot Springs was from January 1 of 1947 until the time of the fire?

Mr. Halley: That is just a yes or no answer.

Mr. Daly: Yes.

A. No, not accurately.

Q. Do you have any records from which that could be determined [298] exactly?

A. Yes, I have, to my best recollection.

Q. What are those records?

A. They are copies of the invoices from various wholesale houses that I have done business with, beside the inventory of January 1, 1947.

Q. They would show the amount of some of the purchases you have made? A. Yes.

Q. Mr. Herzinger, handing you what is marked Plaintiff's Exhibit No. 12 for identification, I will ask you what it is?

A. That is a copy of invoice from Peraldo Wholesale Company, Elko, Nevada, for the period January 1, 1947 to April 30, 1947, purchase receipt.

Q. Was this given to you at your request?

A. Yes.

Q. Handing you Plaintiff's Exhibit No. 13 for identification, I will ask you what it is?

A. That is another copy of invoice from John Digrazia.

Q. Covering the same period?

A. Covering the same period as that.

Q. Was it given to you at your request?

(Testimony of Edward Herzinger.)

A. Yes, it was.

Q. Handing you what has been marked Plaintiff's Exhibit 14 for identification, I will ask you what it is? [299]

A. That is a copy of an invoice of Davidson Wholesale Company covering the same period, from January 1 to May 3, 1947.

Q. Was it given to you at your request?

A. Yes, it was.

Q. And handing you what has been marked Plaintiff's Exhibit 15 for identification, I will ask you what it is?

A. This first exhibit you handed me——

Q. Exhibit 12?

A. Was covering a period up to April 5, 1947.

Q. From whom?

A. From the Peraldo Distributing Company. This sheet here covered the same period, from January 1, 1947, to May 3rd.

Q. In other words, the exhibits 12 and 15 are in part duplicate?

A. Yes, they didn't finish and the next time I went to Elko I had them check on their books and see these later purchases and furnish me this copy.

Q. Does Plaintiff's Exhibit 15 for identification then purport to show the purchases by you from the Peraldo Distributing Company from January 1, 1947, to May 3, 1947? A. Yes.

Q. I hand you Plaintiff's Exhibit marked 16 for identification and ask you what it is?

The Court: We will take our recess at this time.

(Recess taken at 11.50.) [300]

